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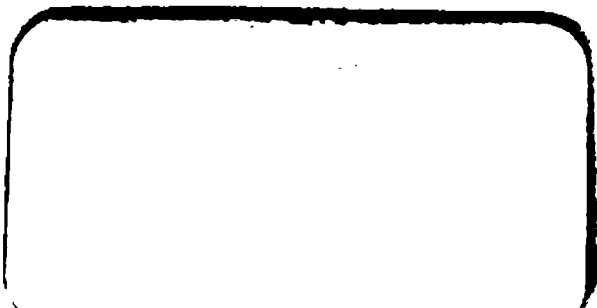
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17

REPORTS OF CASES

DECIDED IN THE

APPELLATE COURTS

OF THE

STATE OF ILLINOIS

VOLUME XLIII

CONTAINING CASES IN WHICH OPINIONS WERE FILED IN THE THIRD DISTRICT IN
JANUARY, 1892; IN THE FOURTH DISTRICT IN FEBRUARY, MARCH,
APRIL AND JUNE, 1892, AND IN THE FIRST DISTRICT
NOVEMBER, DECEMBER, 1891, JANUARY
AND FEBRUARY, 1892.

REPORTED BY
EDWIN BURRITT SMITH
OF THE CHICAGO BAR

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APPELLATE COURTS OF ILLINOIS
DURING THE TIME OF THESE REPORTS.

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CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

THIRD DISTRICT—NOVEMBER TERM, 1890.

THE CONSOLIDATED COAL COMPANY OF ST. LOUIS
V.
ULYSSES G. BONNER.

Master and Servant—Negligence of Master—Personal Injuries—Door-Latch.

1. The extent of an employer's duty is to use ordinary care to provide machinery and appliances for the use of his employes such as are reasonably safe and fit for the purposes they are intended to serve.

2. In an action brought to recover for personal injuries suffered through the alleged negligence of a coal company in continuing the use of a defective door-latch, this court holds that the same resulted from the careless use thereof, that it was not out of repair but reasonably safe and fit for its use, and that the judgment for the plaintiff can not stand.

[Opinion filed January 30, 1892.]

IN ERROR to the Circuit Court of Macoupin County; the
Hon. J. J. PHILLIPS, Judge, presiding.

Mr. CHARLES W. THOMAS, for plaintiff in error.

Messrs. GEORGE L. ZINK and JAMES M. TRUITT, for defendant in error.

PLEASANTS, J. Case for personal injury to defendant in error while engaged as a driver in the company's mine No. 10 at Mt. Olive. A verdict for plaintiff for \$2,500 was returned by the jury. Motion for a new trial denied and judgment entered upon the verdict on which this writ of error was sued out.

The cause was tried upon the general issue to the second count of the declaration, which averred that defendant was operating a coal mine by means of a shaft, and plaintiff was in its employ as a miner therein, whose duty it was to drive a mule hitched to cars loaded with coal, along and through a certain entry thereof and through a door therein so constructed that it would close of itself when opened, and when necessarily opened was held open by a trap or latch until it was necessary to close it; that it was the duty of the defendant to keep said trap or latch in good repair, so that it would securely catch and hold the door when necessarily opened, yet the defendant negligently suffered it to get out of repair so that it would not do so, and that while plaintiff, with due care and caution, was driving said mule hitched to cars loaded with coal through said entry and door, the said door, because said trap was so out of repair, became loosened from said trap and with great force and violence closed and fell upon him and injured him as particularly stated.

It appears that the door referred to, required for proper ventilation of the mine, was six or seven feet high and about as wide, made of inch pine boards, six inches wider at the bottom than at the top and set on an incline of three or four inches to make it close of itself when open, swung on its hinges and opened inward. In going in, the mule would push it open, but in coming out the driver would have to stop, get off, pull it open and keep it so until he passed through with his trip. (A train of two cars or boxes is called a trip. The boxes were about five feet each, in length.) To keep it open there was a latch, made of two by four oak, fourteen inches long, tapering on the under side, with a notch an inch and a half deep, cut with a square corner about seven inches from the point. It was attached to an upright post near the

wall, by a steel pin on which it worked easily, had a free slide and was so arranged that it could drop only so far. A bar fixed to the door and projecting horizontally four inches, passing under the beveled side would raise the latch and when it passed the edge of the notch the latch would fall and hold the door. A wire from its top was extended to and along the track, by means of which the driver, after passing through and without again getting off, could raise it, and the door would then close of itself.

Plaintiff had been employed in the mine for three weeks, at different kinds of work, among others, in driving for one day, during which he passed through this door many times, as the round trip was made in fifteen minutes or less. An experienced driver was sent along to instruct him in his duties, who remained with him for over two hours. On the day in question he was again driving, temporarily, in the place of one then off. He had begun at seven and was hurt at half past nine o'clock. No other person witnessed the occurrence, of which his brief account is, that having gone in with the empties he was coming out loaded, and stopped about fifty feet from the door, got off, pulled it open, pushed it back and returned to his trip. He thought about fifty seconds elapsed from the time he got off to open it until he got back to it with his trip. Just as the mule passed through, the door came to and crushed him against the box beside which he was sitting.

The proof is abundant that if the latch had not caught at all, the door would have come to before he reached his trip, and from the fact that it did catch but held only a few seconds it is claimed, as a proper inference, that it must have been somewhat out of repair.

Bonner himself, having never examined it, could not state its condition. But he introduced seven witnesses who had had experience in the use of it, some before and others after the accident. It was made and set under another company, formerly operating the mine, by a timberman still employed there, and had been in use for a number of years without any change. No defect in it, which could have caused the injury, has been

indicated by witness or counsel. To all appearance it was well adapted and entirely sufficient for its purpose, if used with reasonable care. No complaint of its failure in operation was ever before made or reported to the defendant. All the witnesses for the plaintiff, with perhaps one exception, agree that if it fairly caught it would certainly hold the door.

Duncan Wood, who drove in that entry a week, some time after the accident, testified as follows: "The latch, when I went through it, if I steadied it, it would hold. The mule opened the door with his head, and if I didn't steady it, it would come unlatched again. It would wobble when you put your hand back. The latch was sufficient to hold the door if it was steadied and kept from wobbling. The cars going through would not affect it. The latch would not hold if you pushed the door open against it without steadying the door. When I was going out, if the door was shut I ran ahead and opened the door and pulled the latch down to hold it. After I got through I pulled the rope (wire) and this raised the latch and the door fell to. If you knew this you would not have any trouble.

* * * I never called the attention of the boss or anybody else to that latch." On cross-examination he said: "The first time I opened that door I could see the latch wouldn't hold. When it didn't hold it went shut right away. You could tell at once when you shoved the door back against the prop." This statement would seem to show that when he said it wouldn't hold, he meant that it wouldn't catch; for if it did, the door would not "shut right away." Other witnesses manifestly use the words "hold" and "catch" interchangeably in several instances. If Wood meant to say that he never knew it to let go a fair hold, he claimed to know more than any other. They all agree that if it fell or was put down fully, it always held, and he only adds, "if it was steadied."

It was shown that sometimes it failed to catch or get any hold. For such failure, when it occurred, the testimony discloses two clauses. If the wire was jerked too suddenly or violently it might cause the latch to stick or bind, or raise it too high, and it would fail to fall. If the door was pushed back too violently, the latch might not fall quickly enough to

catch the rebounding bar. Several of the witnesses speak of these causes, but no one mentions any other. In these cases, however, there would be but little danger to the driver, because the door would come back immediately. Going in, on the mule's opening, he would be safely through before it could reach him, or see it in time to protect himself, and going out, on his own opening, it would come back before he could return to his trip and drive to the place of exposure.

A more real and yet a remote danger was that it might so catch as to hold for a little time—until the driver should be exposed—and then let go, as in this case. So far as we can see from the evidence this would happen only where the fall was arrested before completion, by the pressure of the returning bar—as where the door was not pushed far enough beyond the notch, or was slammed too violently to give time for it to fall fully. For if it began to fall, the momentum thus acquired would insure its completion, unless arrested by something outside of itself. The testimony points to nothing of this kind but the door. Its weight and inclination was a considerable force constantly acting. If it caught the latch falling it would stop it.

The liability to this condition, rarely as it would be likely to occur, seems to have been understood by all the witnesses who used the latch; for they all took care to see that it went down fully. If it did not so fall of itself, they put it down with their hands; and in no such case did it fail to hold. How plaintiff dealt with it is pretty clearly shown by the following, taken from his own statement in chief: "Q. Tell the jury, if you opened the door, how you opened it and what you did with it. A. I opened it—of course supposed I pushed it back—opened the door and pushed it back and went and got on my trip. The mule passed through the door, and as the mule passed through the door came shut, which it ought not to have done, and I was caught." Evidently he did not follow the door as he pushed it, nor go to the latch nor take any care to see how it had caught, if he waited to see that it had caught at all.

It did catch, however, which proves that it was not bound,

but was operating according to its design. The strength of plaintiff's case lies wholly in the naked fact that though it caught, it did not hold the door. No attempt was made to show any particular fault or defect in the latch as the cause of this failure, nor was any suggested in the argument. The declaration does not allege fault in its original construction—in the plan, material, make or adjustment of it; but the sole charge is that "the defendant carelessly and negligently permitted the said latch to get out of repair, so that it would not securely catch and hold said door open when the same was necessarily opened." Yet no change whatever was shown to have taken place in it since it was first set up. The evidence is positive and clear that none had taken place. By the accident in question the door was broken and it was repaired, but nothing was done to the latch. No occasion for any repair of it was discovered, and it continued to be used up to the time of the trial, just as it was before and at the time of the accident. If the wobbling of the door ever loosened its hold, that was no fault of the latch, and the declaration does not complain of the door. The averment that the latch itself was so out of repair that it would not securely catch and hold the door is supported only as matter of inference from the mere fact that in this instance it did not. This inference is not fairly deducible from that fact alone. There should be further proof, or some ground for the presumption that it was not prevented by some cause outside of itself; that it had, under the obvious conditions, a reasonably fair chance so to catch and hold.

We think there is no such proof in this record, and that if such a presumption might be indulged in the absence of proof, it was fully overcome by the facts here shown. The undisputed evidence in our judgment clearly establishes the following propositions:

First. The latch was so made and adjusted that when raised it would promptly fall by its own weight, unless it was raised so far as to be balanced on the pin, or prevented by some cause outside of itself. Second. In this instance it was not so balanced nor otherwise prevented. Third. Whenever it began

to fall it would fall as far as was designed by its arrangement, the full depth of the notch, below the top of the bar, unless arrested by some force or cause external to itself. Fourth. When it so fell over the bar, it invariably held until it was purposely raised. Fifth. Its fall might be arrested before its completion by the returning bar.

These propositions strongly oppose appellee's theory, which is, that though it had a fair chance it failed, through some defect in itself, to catch as fully as it ought, or having so caught, let go its hold. We find in the record no evidence which to our minds reasonably supports that theory as against these propositions. The most consistent if not the only rational explanation of the unfortunate event, seems to us to be found in the supposition that appellee failed to push the door far enough, or slammed it too violently to give the latch time to fall fully before its return; that the latch therefore barely caught the bar on its edge; that this slight hold stayed the door while at rest, but was broken by its vibration caused by the weight and motion of the loaded trip as it came near.

Appellee himself says: "I couldn't say whether the cars jarred it loose or not. It looked to me as if something of the kind had not been it would have come shut and caught the mule." But his witness, Wood, said that if it was fully down the cars passing through would not affect it. That statement is confirmed by the experience of all the others. They had to pull the wire, after passing through, in order to raise it. The inference must be that on this occasion it was not down, and the only reason suggested by the evidence is that it had not time so to fall. This does not imply any defect in it which appellant's duty required it to remedy, since it may as well have been due to an improper manner of opening the door. It may be true that the company could have provided a better latch, one that would act more certainly and promptly and with less attention on the part of the driver. But it was not bound to provide the best. The extent of its duty was to use ordinary care to provide one that was reasonably safe and fit for the purpose it was intended to serve. *Camp Point Mfg. Co. v. Ballou*, 71 Ill. 417; *Cooley on Torts*, 557, and cases

cited in note. Here a very rude and simple contrivance might be such. The evidence shows that this latch was all that could be reasonably expected in such a place for such a purpose. We doubt if a single juror who joined in this verdict, in the place of the company and with knowledge of all that was proved as to its character and condition, would have thought for a moment that any change or repair was required to make it reasonably safe and fit for its intended uses. The whole arrangement of door and latch, obviously called for attention on the part of the driver to see that the latch caught as it was designed to catch. Appellee understood this arrangement. He knew the latch was to hold a heavy door strongly inclined to shut of itself, and exposed to be jarred by the passing trip. Common sense and ordinary care would dictate the precaution to see that it got a good hold; for common experience teaches that latches generally are liable to stick, and for other reasons sometimes fail to catch or to catch sufficiently even against an ordinary door that is slammed or not pushed clearly beyond the notch.

Under the issue made by the pleadings, the burden was upon him to show affirmatively, by a preponderance of the evidence, not only that in this instance it did not, but that though he used it with ordinary care, it would not, by reason of being itself out of repair, securely catch and hold the door; that it was so out of repair through the want of ordinary care on the part of the company, and that the defect was the proximate cause of his injury. A failure to so establish either of these propositions should prevent a recovery.

We are clearly of opinion that the opposite of each of these is at least no less consistent with all the evidence. It just as strongly tends to prove that the latch generally did catch and hold, was not out of repair, and was reasonably safe and fit for its intended use; that therefore there could have been no negligence on the part of the company, and that appellee's injury is to be attributable directly to his careless manner of opening the door.

In such case the law is, as stated in *Smith v. The First National Bank*, 99 Mass. 605, that "Where the evidence

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tends equally to sustain either of two inconsistent propositions, neither of which can be said to have been established by legitimate proof, a verdict in favor of the party bound to maintain one of these propositions against the other is necessarily wrong." See also *C. & A. R. R. Co. v. Mock*, 88 Ill. 87. Considering the measure of the duty resting upon it, we think the evidence largely preponderates in favor of the appellant on all these issues. Had just such a latch been provided to hold open a farm gate which closed by a weight, and failing to hold it when opened in like manner, the gate had come to, and by frightening the team or otherwise, injured the hired driver who thus opened it, would the jury by their verdict have given him the old man's farm? Yet the measure of defendant's duty would be the same in that case as in this. It applies alike to farmers and mechanics, to individual employes in small industries, as to proprietors of large plants and wealthy corporations. If the latch would have been good enough in that case, impartial justice must hold it to have been so in this.

For the reasons above stated, we think this verdict should have been set aside, and because it was not, the judgment will be reversed and the cause remanded.

Reversed and remanded.

COMMISSIONERS OF HIGHWAYS

V.

JOSEPH F. DEBOE.

48	25
100	277

Highways—Enjoining of Commissioners of, from Paying Damages—Practice—Pleading—Parties.

1. An answer is deemed impertinent if it goes beyond the allegations of the bill to state some matter not material to the case and not constituting a defense.

2. Allegations which are unbecoming the dignity of the court to hear, or are contrary to good manners, or charge some person with an offense, are deemed scandalous, unless such matters are proper to the defense of a given bill. To be deemed scandalous the matter must, at the same time, be

impertinent; for no matter how scandalous it may be in matter of fact, it is not scandalous within the meaning of the word as used in equity pleading, if it is pertinent to the case.

3. The writ of injunction can only afford preventative relief. It can not be employed to correct a wrong or injury already done, nor to restore parties to rights of which they have been already deprived.

4. It is a good defense to a bill for an injunction, to show that the act sought to be prevented had already been done before the bill was filed. It is idle to speak of restraining the borrowing of money already borrowed, or the issuing of orders already issued.

5. A complainant, in chancery, must recover upon the case made by the bill. If upon a hearing, a good case appears in the evidence, if it does not correspond with the allegations of the bill relief can not be given.

6. If an answer presents a complete defense to the case as made by the bill, but in doing so discloses a good case for the complainant upon another ground than that which is set up in the bill, the complainant may avail himself of the new case by applying for and obtaining leave to amend his bill, and then setting out the facts that will warrant a decree in his favor.

7. Highway commissioners are empowered by Sec. 17, Chap. 121, R. S., in force July 1, 1883, to draw orders on their treasurer in favor of the owners of land taken for highway purposes, the same to be payable only out of a tax to be subsequently levied and collected for their payment.

8. Such orders should only be delivered to the land owners. Where they are disposed of to third persons, such irregularity can not, after its occurrence, be corrected by a writ of injunction.

9. As a general rule any tax payer of a given town has sufficient interest in the actions of highway commissioners to constitute him a proper party to institute an action to restrain them from the performance of an unlawful official act, if such illegal act will specially injure or damage him; if the threatened act will operate to increase the burden of his taxation, or the aggregate indebtedness of the town, such would be regarded as an individual injury and damage to him.

10. This rule is limited to cases where the action is instituted by the tax payer in good faith and for the protection of his own interest. Relief will not be granted if it appears that he is merely a colorable plaintiff suing really in behalf of other parties in interest.

11. If public officers are about to violate an official duty which is public in its nature, and the violation of which affects the public in general alike, a citizen who is not threatened with some special injury or damage can not volunteer to become a complainant and prevent the violation by injunction. The remedy in such case is upon application to the proper public officer, who will proceed in behalf of the public.

12. A bill filed at the instigation of others by an individual who has no private interest involved, other than, or different from the body of the tax payers of a given town, should not be entertained.

13. If two inconsistent acts be passed at different times, the last is to be obeyed and the first must give way.

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[Opinion filed January 30, 1892.]

APPEAL from the Circuit Court of Sangamon County; the Hon. JACOB FOUKE, Judge, presiding.

This was a bill in chancery filed on the 11th day of February, 1891, in the Circuit Court of Sangamon County, by the appellee, in which it is alleged that the appellants, as commissioners of highways, threaten to open a public highway on the section line between sections 29 and 32, and threaten to pay to Robert H. Easly and James Drennan damages awarded them for land taken for said highway; that the commissioners have no funds in their treasury levied for the purpose of paying such damages, and have made no levy to procure funds for such purpose, but that they are about to borrow money to pay such damages, or are about to draw orders on funds in their treasury, levied for road and bridge purposes, and misappropriate it to the payment of the damages to Easly and Drennan; that Drennan and Easly have no orders for such payments, but that unless restrained the commissioners will borrow money to pay Easly and Drennan, or misappropriate funds already in their hands to that purpose. The prayer of the bill is that the appellants, as such commissioners, may be enjoined from the commission of such alleged illegal acts.

The appellants exhibited an answer to the bill, in which they admit that they are intending to open the road, and allege that it was duly and legally laid out and established as a highway by three supervisors on an appeal from them as commissioners. They allege that damages were awarded to Easly and Drennan, and aver a readiness and willingness to pay the same, but deny that they are about, or ever intended, to borrow money for that purpose, or that they intend, or have threatened to issue or draw orders on their treasurer against taxes levied or collected for other purposes, for the payment of such damages, and deny that they have ever illegally used or paid out, or intend to use or pay out, or misappropriate any fund in their treasury.

The answer also contained further averments which were

excepted to as being impertinent and scandalous, which are substantially as follows: That after the road was laid out by the order of the supervisors and before the filing of the bill, the appellants drew orders to Drennan and Easly or bearer for the amount of their damages respectively, to be paid out of taxes to be thereafter levied and collected in due course of law, and tendered such orders to Drennan and Easly, who refused to receive them, whereupon a citizen of the township offered to take, and did take, such orders at par and advanced the full amount of them to pay to Drennan and Easly; that such money was advanced without discount, interest, or cost to the town, and that the same money was tendered to Easly and Drennan and that each refused to receive it, and that the money is still held by their treasurer for Drennan and Easly whenever they will accept it, and that they are ready and willing and now offer to pay same to said Easly and Drennan respectively, in payment of their said damages, as may be directed by this court.

They further aver on information and belief that said complainant, Joseph Deboe, is a nominal complainant in this cause, knowing little and caring less about matters set up in said bill of complaint, and used as mere tool of said Drennan and Easly in obstructing, hindering and delaying the opening of said road, and that this suit is not brought by complainant in good faith, but only at solicitation of said Easly and Drennan, to bother and obstruct said highway commissioners in the proper and legal performance of their duties in opening said road, in conformity with said order of said supervisors.

Attached as Exhibits A and B to the answer, were copies of the orders issued intended for Easly and Drennan. These orders were drawn on the 6th day of December, 1890, by the commissioners on their treasurer and direct him to pay the amounts respectively due to Drennan and Easly out of moneys in his hands not otherwise appropriated, and each order contains the following statement: "This order is payable only out of the tax to be levied in due course of law for payment of damages for laying out roads, when the money shall be collected."

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The exceptions filed against the answer were sustained by the court, and appellants failing and refusing to amend the answer, the bill was taken as confessed, and a decree rendered *pro confesso* for the appellee, perpetually enjoining and restraining the appellants from borrowing any money to pay damages agreed upon or allowed for lands taken in laying out a road on the line between sections 29 and 32 in Ball township, and from drawing orders on the treasurer, or paying any money for said damages except out of moneys levied for that purpose, and from using any money, levied for the purpose of roads and bridges and the payment of outstanding orders drawn on their treasurer, for the purpose of paying such damages.

The commissioners by appeal bring the record to this court for review.

Messrs. STEVENS & LANPHIER, for appellants.

Messrs. CONKLING & GROUT, for appellee.

Boggs, J. An answer is deemed impertinent if it goes beyond the allegations of the bill to state some matter not material to the case, and not constituting a defense.

Allegations which are unbecoming the dignity of the court to hear, or are contrary to good manners, or charge some person with an offense, are deemed scandalous unless such matters are proper to the defense of the bill. To be deemed scandalous the matter must at the same time be impertinent, for no matter how scandalous it may be in matter of fact, it is not scandalous within the meaning of the word as used in equity pleading if it is pertinent to the case.

The appellants, it will readily be conceded, might properly set out in their answer any matter from which it would appear that the appellee was not entitled to the relief prayed for by the bill, and such matter would be pertinent.

The bill charges that the appellants, as commissioners of highways, are about to borrow money for the purpose of paying damages awarded to Easley and Drennan, or are

about to draw warrants or orders on their treasurer for such damages, to be paid out of funds in the hands of the treasurer levied and collected for other purposes, and the prayer is that they be restrained by injunction from the commission of such illegal acts. The answer denies that the appellants are contemplating or intending to so illegally borrow money or misappropriate any fund, and proceeds to state in detail to the court all their acts and doings in and about the matter of procuring money wherewith to pay the damages to Drennan and Easley, which is the gravamen of the charge against them. This we conceive they were called upon to do by the rules of equity pleading.

It is, however, said by counsel for the appellee that the acts of the appellant in drawing orders payable to Drennan and Easley, when there was no money in their treasury to pay such orders and no tax levied for their payment, and the act of the appellants in delivering the orders to persons other than Drennan and Easley, as disclosed by the answer, were illegal, and therefore presented no defense to the bill, and that all the averments of the answer concerning such acts were for that reason impertinent. To what extent these acts of the appellants, as highway commissioners, were illegal, we shall presently see, but, whether legal or illegal, we think they presented a ground of defense to the bill.

The writ of injunction can only afford preventative relief. It can not be employed to correct a wrong or injury already done, nor to restore parties to rights of which they have been already deprived. *Menard v. Hood*, 68 Ill. 121; *Am. & Eng. Encyc. of Law*, 796-8.

It is a good defense to a bill for an injunction, to show that the act sought to be prevented had already been done before the bill was filed, and it is manifest that if the averments of this answer are true, that the court was powerless to grant the relief prayed for. It is idle to talk about restraining the borrowing of money already borrowed, or the issuing of orders already issued.

Yet such was the state of case disclosed by the averments of the answer. It is suggested that the answer developed the

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fact that the appellants, as commissioners, had in their hands the money received for the orders, and that if the disposition made of them was in fact but a borrowing of the money, that the court might enjoin them from paying it out. The bill does not contain any charges of this kind. A complainant in chancery must recover upon the case made by the bill. Even if upon a hearing a good case appears in the evidence, yet if it does not correspond with the allegations of the bill, relief can not be given. *McKay v. Bissett*, 5 Gilm. 499; *Morton v. Smith*, 86 Ill. 117; *Pinneo v. Goodspeed*, 104 Ill. 184.

In this case the answer was excluded by the court, and the decree rendered upon the theory, that for want of an answer, the allegations of the bill were confessed. The decree, therefore, must rest solely upon the allegations of the bill and can not be aided by any averment of the excluded answer.

If an answer presents a complete defense to the case as made by the bill, but in doing so, discloses a good case for the complainant upon another ground than that which is set up in the bill, the complainant may avail himself of this new case by applying for and obtaining leave to amend his bill, and then setting out the facts that will warrant a decree in his favor. *White v. Morrison et ux.*, 11 Ill. 361.

We think the appellants, as highway commissioners, were empowered by Sec. 17 of Chap. 121 of the Revised Statutes, in force July 1, 1883, to draw orders as they did on their treasurer, for the amounts due Drennan and Easley, payable as those orders are only out of a tax to be subsequently levied and collected for their payment.

Secs. 13 and 15 of the same chapter authorizes a tax levy to be afterward made for the purpose of paying such orders.

It is true that Sec. 1 of chapter 146 of the statutes in force July, 1879, prohibits the drawing or issuing of such orders, unless there be sufficient money at the time in the appropriate fund of the treasury for their payment, but it is the prior enactment.

The rule is, that if two inconsistent acts be passed at different times, the last is to be obeyed, and the first must give way. *Devine v. Commissioners*, 84 Ill. 590.

While the two enactments differ in the respect named, still it is to be observed that the difference affects only the issuance of the orders. As to their payment there is no difference between the warrants authorized to be issued by Sec. 17 of Chap. 121, and the warrants commonly called anticipation warrants, authorized to be issued under Sec. 2 of Chap. 146. It is only out of taxes to be collected in the future that either can be paid. The orders drawn by the appellants could, however, only be delivered to Easly and Drennan. Power to otherwise dispose of them is not given by any section of the statute, nor is such power to be implied from any power that is given. Upon the contrary, Sec. 17, which, as we have seen, authorizes the orders to be drawn, expressly provides that they shall "be given to the persons damaged." The action of the appellants in disposing of these orders to other persons, though for their face value, was irregular and not warranted by law. But this irregularity can not, after its occurrence, be corrected by a writ of injunction, though it may rest in the power of the chancellor, under a bill appropriately framed for that purpose, and which brings the necessary parties before the court, to cause the appellants to repossess themselves of the orders and deliver them to parties entitled by the statute to receive them; though for reasons hereafter given it must not be understood that we hold that such relief can be given, upon a bill filed by this appellee.

The pertinency of the averments of the answer, to the effect that the appellee has no individual interest in the case and is complainant only in name, remains to be determined. The answer charges that the appellee is complainant in name only, that he brought the suit at the instance and in the interest of Easly and Drennan, and to aid them in hindering and delaying the opening of the road on the said section line; that the suit is really the suit of Drennan and Easly, the appellee being a mere instrument in their hands. The answer further charges that the appellee has no real estate in the township, and that his personal tax does not exceed the sum of \$8, and that he does not really care about the manner in which the money is raised to pay Drennan and Easly, but appears as complainant only at

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their solicitation and request. We think this pertinent to the case, and if pertinent, it is not scandalous.

It may be conceded that any tax payer of the town of Ball has sufficient interest in the actions of the highway commissioners to constitute him a proper party to institute an action to restrain the commissioners from the performance of an unlawful official act, if such illegal act will specially injure or damage him. If the threatened act will operate to increase the burden of his taxation, or the aggregate indebtedness of the town, such would be regarded as an individual injury and damage to him.

Such is in effect the general rule, but this general rule is limited to cases where the action is instituted by the tax payer in good faith and for the protection of his own interest. Relief will not be granted if it appears that he is merely a colorable plaintiff, suing really in behalf of other parties in interest. 2 High on Injunctions, Sec. 1302; Putney v. Lynn Paving Co., 13 W. R. 983.

If public officers are about to violate an official duty which is public in its nature, and the violation of which affects the public in general alike, a citizen who is not threatened with some special injury or damage can not volunteer to become a complainant and prevent the violation by injunction. The remedy in such case is upon application to the proper public officer, who will proceed in behalf of the public. City of Chicago v. Union Building Association, 102 Ill. 379; Seager v. Kankakee County, 102 Ill. 669.

If the allegations of the answer are true, we are at a loss to know how appellee's burden of taxation, whether great or small, will be increased by the act of the commissioners in delivering the orders to persons other than Drennan and Easley.

The orders, as we have seen, are valid, and if delivered to Easley and Drennan, will be included in the next regular tax levy, and if they are retained by the present holders the amount of them would in like manner be included in the same levy. In respect of them the amount of appellee's taxation in either event will be the same and will be paid by him at

the same time and in the same manner. Nor is the aggregate indebtedness of the town in anywise increased by the irregular disposition of the orders.

If it is true, as the answer avers, that the appellee instituted the suit at the instigation of Easley and Drennan, and that he has no private interest involved, other than, or different from the body of the tax payers of the town, his bill should not be entertained. 2 High on Injunctions, Secs. 1298, 1299, 1300 and 1301.

The averments of the answer under consideration, attacked directly the standing of the appellee as a proper party complainant, and if sustained by proof, would operate to wholly defeat the action. Therefore the exceptions to the answer ought not to have been sustained, but should have been overruled.

The decree must be reversed and the cause remanded for further proceedings consistent with the views here expressed.

Reversed and remanded.

CHARLES McCAFFREY

V.

CHARLES B. DUSTIN, ADMINISTRATOR.

Insolvency—Fraudulent Sale—Negotiable Instruments—Note—Garnishment.

1. A person, insolvent when he sells certain property, can not, as against his creditors, make a gift to his wife of notes given upon such sale, nor can he invest her with title to them by way of a settlement in her favor, except for a valuable consideration.

2. While a wife may refuse to execute a deed except on condition that a portion of the purchase price be paid or secured to her, where the evidence fails to show that she demanded it to be done, or that it was done as compensation to her for her possible interest in the land, her release of her right of dower therein can not be looked upon as constituting such consideration.

3. Where purchase money notes are made payable to the wife, by the mere voluntary act of her insolvent husband, the grantor, it is the presump-

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tion of the law that this was done with fraudulent intent as to his creditors, and is therefore void as to them.

4. One who buys a note after its maturity, takes it subject to all equities and defenses existing between the original parties to the instrument. A past due note is already dishonored and comes to one about to buy it, tainted with suspicion and discredited upon its face. A person buying it, takes it subject to any right acquired by an attaching creditor by garnisheeing the maker.

5. An indorsement without date is presumed to have been made before the maturity of the note, but this is a *prima facie* and not a conclusive presumption, and may be rebutted by evidence. To so rebut, it is competent to show that the note remained the property of the payee after its maturity, and the acts or declarations of the payee while having possession of the note, as to its ownership, are admissible to rebut this legal presumption.

6. The purchaser of a note, due and dishonored when offered to him for sale, is in duty bound to make inquiry as to the rights of the former holder and the liability of the maker, and he is chargeable with notice of all he could have learned had he made inquiry, should he fail to do so.

[Opinion filed January 30, 1892.]

APPEAL from the Circuit Court of Pike County; the Hon. C. J. SCOFIELD, Judge, presiding.

Messrs. COLVIN & HESS and ORR & CRAWFORD, for appellant.

Messrs. HARRY HIGBEE and DOOCY & BUSH, for appellee.

BOGGS, J. On the first day of the November term, 1887, of the Circuit Court of Pike County, Sarah B. Dustin obtained a judgment against one G. J. Shaw for \$517.33 and costs.

Five days before the commencement of the court, Shaw, who was then insolvent and indebted to a number of persons besides Mrs. Dustin, conveyed a farm to Isaac Barton for the sum of \$4,400, which sum was paid in the following manner:

Barton assumed to pay mortgages on the farm to the amount of \$2,429, and surrendered to Shaw notes due him from Shaw amounting to \$400, and for the remainder of the purchase price of the farm executed his two notes, one for \$571, due October 27, 1887, the other for \$1,000, due October 27, 1888.

These two notes at the request of Shaw were made payable to his wife, Sophia Shaw. An execution issued on the judgment was returned, "No property found." The necessary affidavit was at once filed, and garnishee summons for Barton and Sophia Shaw issued, returnable to the following April term of the court. This summons was served on Barton and Mrs. Shaw on the 7th day of November, 1887.

The note for \$571 given by Barton was then past due and in the hands of Sophia or G. J. Shaw. The latter had the note and endeavored to sell it in January and also on the first of February, 1888. On the 2d day of February, 1888, the appellant purchased the note from W. A. Shaw, a son of G. J. and Sophia Shaw.

It was then indorsed without date by Sophia Shaw, and some days after its delivery to appellant, W. A. Shaw also indorsed it.

Garnishee summons for appellant was sued out and served upon him, and at the April term of court the issues as to all the garnishees were consolidated and submitted to a jury, the result being a verdict and judgment against Barton in favor of the administrator of Sarah B. Dustin, then deceased, for the amount of the judgment in her favor against Shaw, and in favor of the appellant for the remainder of the note. From this judgment the appellant perfected this appeal to this court.

G. J. Shaw was insolvent when he sold the farm to Barton. He could not, therefore, as against his creditors, make a gift to his wife of the two notes, nor could he invest her with title to them by way of a settlement in her favor, except for a valuable consideration. *Schouler on Husband and Wife*, Secs. 373-4; *Patrick v. Patrick*, 77 Ill. 555; *Moritz v. Hoffman*, 35 Ill. 553.

Appellant contends that the release by Mrs. Shaw of her contingent right of dower in the land sold, constituted such consideration. No doubt a wife may refuse to execute a deed except on condition that a portion of the purchase price be paid or secured to her, but the evidence fails to show that Mrs. Shaw demanded this to be done, or that it was done as compensation to her for her possible interest in the land. Upon

the contrary the jury were amply warranted by the evidence in arriving at the conclusion that she was named as payee in the notes for the purpose of placing them beyond the reach of the creditors of her husband and as a mere guise to perpetrate a fraud. All of the circumstances of the transaction as disclosed in the evidence justly raised this presumption of fraud, and the direct effect of these acts of Shaw and his wife was to secrete this property from his creditors. Aside from these notes Shaw had no property from which payment of his debts could be enforced. The notes having been made payable to the wife by the mere voluntary act of the insolvent husband, it is the presumption of the law that this was done with fraudulent intent as to creditors of the husband and is therefore void as to such creditors. *Moritz v. Hoffman*, 35 Ill. 553.

It is then to be considered that as to creditors, Barton's indebtedness upon the note in question was really to G. J. Shaw.

Such was the true situation on the 7th day of November, 1887, when Barton was garnisheed by Sarah B. Dustin. The note was then past due and in the hands of G. J. Shaw or Sophia Shaw. It is the uncontradicted proof that G. J. Shaw had the note at different periods after that time. Had Barton been sued upon the note by either G. J. or Sophia Shaw, he could have successfully pleaded the fact that he had been garnisheed by the appellee, Dustin. The plea, good against either of them, is equally good against the appellant, McCaffrey, as either G. J. or Sophia held the note after it fell due and when Barton was served with the garnishee summons.

It is an elementary rule, that one who buys a note after its maturity, takes it subject to all equities and defenses existing between the original parties to the instrument. A past due note is already dishonored and comes to one about to buy it, tainted with suspicion and discredited upon its face. If he buys it, he becomes its owner subject to all existing equities and rights of others including the right acquired by an attaching creditor by garnisheeing the maker. *Snider v. Ridgeway*, 49 Ill. 522; *Waples on Attachment*, p. 208; and

in support of the same principle see Patton v. Graves, 67 Ill. 164. It is true the note came to McCaffrey bearing the indorsement of Sophia Shaw not dated, and further it is true that an indorsement without date is presumed to have been made before the maturity of the note. This is, however, a *prima facie*, not a conclusive presumption, and may be rebutted by evidence. To rebut this presumption, it is competent to show that the note remained the property of the payee after its maturity, and the acts or declarations of the payee while having possession of the note, as to its ownership, are admissible to rebut this legal presumption. 2 Parsons on Notes and Bills, 9, 10.

The evidence shows that G. J. Shaw was offering the note for sale in January and on the 1st of February, long after it was due. G. W. Schwartz testified that the appellant told him that William Shaw said he was selling the note for his mother (Sophia).

Peter Higgins testified that appellant told him that Sophia Shaw owned the note he bought. The appellant testified that W. A. Shaw did not indorse the note when he bought it, but that he procured Shaw to indorse it some days after the purchase, because he heard there was likely to be trouble about it. The evidence warranted the jury in finding not only that the note was not indorsed to W. A. Shaw until after it was due, but also after Barker was garnisheed, and that the indorsement when made was but a fraudulent pretense and not a *bona fide* transfer of right of property in the note.

The evidence also justified the conclusion that the appellant, McCaffrey, understood that the note was the property of Sophia Shaw, and that William Shaw was merely selling it for her. It is not contended, as appellant supposes, that the service of the garnishee summons created a lien on the note.

The note was due and dishonored when offered to him for sale. This imposed upon him the duty of making inquiry as to the rights of the former holder, and the liability of the maker, and he is chargeable with notice of all he could have learned upon inquiry of Barton. Jay v. Reed, 56 Ill. 130; Lord v. Favorite, 29 Ill. 149.

Appellant knew that Barton knew he was financially good;

Seybold v. Morgan.

they were neighbors, and he could have learned upon reasonable inquiry why the note, though some months past due, had not been paid.

Inquiry would have brought to the appellant the knowledge that Barton had not paid the note because he had been garnisheed by a creditor of the owner of the note.

He is therefore not a *bona fide* holder without notice, but holds with notice, because the law charged him with the duty of making inquiry, and with knowledge and notice of all that due inquiry would have developed.

The instructions of the court were framed upon the true theory of the law, and taken all together, fairly state the law of the case. The judgment must be affirmed.

Judgment affirmed.

43	39
109	1 87

GATES SEYBOLD
V.
WILLIAM S. MORGAN.

Husband and Wife—Necessaries Furnished Wife—Recovery for—Separate Maintenance—New Trial—Practice.

1. At common law a husband was liable in an action at law at the suit of any person furnishing his wife with the necessities of life suitable to her condition, if she was residing apart from him because of his wrong or with his consent.

2. The husband has uniformly been held liable for the funeral expenses of the wife, though at the time of her death she lived apart from him of her own fault.

3. No right of action at common law existed in such case in favor of the wife either at law or in equity. She could only rely upon obtaining credit from those who were given a right of action against her husband.

4. A bill for separate maintenance can not be sustained in a case of separation by mutual consent, but only where the separation was without the wife's fault. The enactments of the statute touching separate maintenance in no wise affect the common law right of action in favor of persons supplying necessities to the wife. Such right of recovery still exists by force of the common law, if the wife is living separate from her husband because of his fault or wrong, or with his consent.

5. Whether the separation in a given case was because of the fault of the husband, or was with his consent, is a question of fact for the determination of the jury.

6. A new trial should not be granted in such case, for the reason that the person with whom the wife lived, and who brings suit after her death against her husband to recover for necessities furnished her in her lifetime, in which suit the plaintiff prevails, had in his possession a letter written by the husband to the wife which the husband insists should have been produced in evidence upon the trial of such suit, no notification or request to produce the same having been given, it being cumulative evidence only.

[Opinion filed January 30, 1892.]

APPEAL from the Circuit Court of Pike County; the Hon. C. J. SCOFIELD, Judge, presiding.

Mr. W. E. WILLIAMS, for appellant.

Messrs. A. G. CRAWFORD and EDWARD YATES, for appellee.

BOGGS, J. At the April term, 1891, of the Circuit Court of Pike County, the appellee, upon the verdict of a jury, recovered a judgment against the appellant in the sum of \$150 for necessities furnished the wife of appellant, including medical bills and the funeral expenses of the wife.

That the appellant's wife lived in appellee's family and was supported by him for nearly a year prior to her death, and that he incurred indebtedness for the services of a physician for her, and the expenses of her burial, in all equaling the amount of the judgment, is not questioned.

Counsel for appellant in his brief says: "The only question involved in this case under the pleadings and the proof is, whether or not the wife was, at the time the services were rendered, living separate and apart from the appellant without his fault." In this we think counsel is under some misapprehension as to the law. We think the question of whether she lived apart from him with his consent or acquiescence also arises in the case. At common law the husband was liable in an action at law at the suit of any person furnishing the wife with necessities of life suitable to her condition, if she was residing apart from the husband because

Seybold v. Morgan.

of his wrong, or with his consent. 2 Kent, Com., 146; Schouler on Husband and Wife, Sec. 117.

The husband has uniformly been held liable for the funeral expenses of the wife, though at the time of her death she lived apart from him of her own fault. *Patterson v. Patterson*, 59 N. Y. 574; *Bradshaw v. Beard*, 12 Conn. (B. N. S.) 344.

No right of action at common law existed against the husband in favor of the wife either at law or in equity. She could therefore only rely upon obtaining credit from others who were given a right of action against the husband. If others declined to supply her wants in consideration of the right to sue the husband for their bills, the wife was, under the rules of the common law, practically helpless.

To remedy this defect our statute, giving a right of action to the wife directly against the husband by a bill in chancery, for separate maintenance, was enacted; but as it is not the policy of our law that husband and wife should live separate, the statute restricted the remedy thus provided for the wife to cases where the separation was "without her fault." The remedy of the statute can not, therefore, be invoked in cases of separation by mutual consent, but its enactment in nowise affected the common law right of action in favor of a person who supplied necessaries to the wife. Such right of recovery still exists by force of the common law, if the wife is living separate from the husband because of his fault or wrong, or with his consent. *Evans v. Fisher*, 5 Gilm. 569; *Ross v. Ross*, 69 Ill. 569.

Whether the separation in the case at bar was because of the fault of the husband, or was with his consent, was a question of fact for the determination of the jury. It must be conceded, that the evidence produced by the appellee did not show that the separation was because of the fault, or that it was with the consent of appellant. But the appellant testified quite fully as to the cause of the separation and his own testimony is, we think, sufficient evidence to support the finding of the jury. Unless error is found in the giving or refusing of instructions, the verdict and judgment must stand.

The only complaint as to the instructions is as to the refusal

of the court to give instructions numbered nine and ten asked by the appellant. Instruction number nine directed the jury that there could be no liability unless the appellant refused to furnish his wife with the necessities of life at his residence, or abused her, or failed to discharge the duties of a husband so that she could no longer live with him.

This the court properly refused to give, because, as we have seen, a liability existed against the appellant if the separation was with his consent and acquiescence. The principle sought to be announced to the jury by instruction number ten is merely an abstract one, and which, so far as it is correct and applicable to the case, is fully stated in other instructions that were given.

The instructions given to the jury we think fully and fairly stated the law governing the matters at issue in the case. One of the grounds upon which a new trial is asked is, that appellee had in his possession a letter written by the appellant to his wife, which appellant insists ought have been produced in evidence. The appellee was not notified or requested to produce the letter, but if it be granted that it was his duty to have voluntarily done so, still we do not think the judgment should be disturbed.

The letter is but a written statement of appellant not under oath. The jury heard him fully under oath as to the entire married life of himself and deceased wife. No one contradicted him, and indeed his version of the conduct of himself and of his wife and of their troubles and separation was all that the jury knew about it. Upon his own testimony they condemned him. It would be very unreasonable to suppose that the unsworn statements of his own letter would have had greater weight than the detail of facts and circumstances testified to by him upon the witness stand. If admitted the latter would be but cumulative evidence.

The merits are, we think, with the appellee, and we do not find such error in the record as would justify a reversal. The judgment must be affirmed.

Judgment affirmed.

Hewett v. Griswold.

A. M. HEWETT
V.
JOHN W. GRISWOLD.

43	43
52	313
43	43
69	296

Fraudulent Sales—Corn in Crib.

1. As against creditors, sales of personal property by verbal contract may be deemed fraudulent and voidable, first, when the contract was entered into with fraudulent intent; second, when by the rules of law a fraudulent intent is presumed from the nature and character of the transaction. Of this latter class are sales made when there is no change, actual or constructive, of the possession of the property.

2. If after a sale the property remains in the possession and control of the vendor as before the sale, the law conclusively presumes that the transaction is fraudulent as to creditors.

3. When articles sold are cumbrous or ponderous, so that a removal is not practicable, it is not necessary that there should be an actual change of possession from hand to hand, but it is sufficient if the buyer assumes the control of the property in an open and notorious manner, and the seller is divested of every species of possession from which an inference of ownership might arise.

4. Whether in such case all has been done that ought to have been done to constitute a delivery, is largely a question of fact to be determined by the jury under proper instructions.

5. There is no difference in effect between a sale made with actual intent to defraud creditors, and one fraudulent in law. Notice of either is only notice of a fraudulent transaction not binding upon a creditor.

6. In the case presented, this court holds, in view of the evidence, that there was no such change in possession of certain cribs of corn as the rules of law required, and that the sale thereof was fraudulent in law, and void as to creditors.

[Opinion filed January 30, 1892.]

APPEAL from the Circuit Court of Montgomery County;
the Hon. JACOB FOUKE, Judge, presiding.

Messrs. J. C. McBRIDE and J. M. TRUITT, for appellant.

We admit that the general rule is sometimes stated, in cases where the question of notice is not involved, to be that an absolute sale of personal property susceptible of delivery, where

the possession is permitted to remain with the vendor, is fraudulent *per se* and void as to creditors and purchasers; but we insist that such is not the rule in cases where the creditors and purchasers have notice. The reason of the rule is that parties may not be deceived and defrauded by the apparent ownership, and a person having notice can not complain. *Gradle v. Kern*, 109 Ill. 557-564; *Lewis v. Swift*, 54 Ill. 436-7; *Ketchum v. Watson*, 24 Ill. 591; *Thompson v. Yeck*, 21 Ill. 73; *Lapp v. Pinover*, 27 Ill. App. 169; *Curran v. Bernard*, 6 Ill. App. 341; *Huschle v. Morris*, 131 Ill. 587-593.

“At all events, we are of opinion appellant having actual notice of the levy when he converted the property, is in no condition to complain that sufficient publicity was not given to it.” *Richardson v. Rardin*, 88 Ill. 124-129.

Reverse the parties, and the above case will be on “all fours” with the case at bar.

And it is well settled that an actual removal of an entire mass of a cumbrous article (as a crib of corn) is not necessary to constitute a delivery and change of possession. *May v. Tallman*, 20 Ill. 443; *Hart v. Wing*, 44 Ill. 141; *Ticknor v. McClelland*, 84 Ill. 471, and cases cited at bottom of page 473.

And this rule was held applicable to three stacks of hay which had been sold, but not removed, and was then levied upon by a judgment creditor, without notice. *Ticknor v. McClelland*, 84 Ill. 471.

“But if one buying a stack of hay, a raft of logs or a large pile of lumber, is not required to remove such things, but may leave them during his pleasure at the place where they were when he purchased, we do not see why appellant, who had bought the corn in September and had it gathered and cribbed where he wanted it to remain, possibly through the winter, should be compelled to remove it from such place to protect his title, any more than if he had, upon the 28th of November, bought it for the first time, and regarded the understanding of himself and Hendrix, that the cribs were then and there delivered, as a delivery which, in the latter case, would be good.” *Vaughn v. Owens*, 21 Ill. App. 249.

The purchaser of chattels who does not take possession until

Hewett v. Griswold.

after they had been attached by a creditor of the seller without notice of the sale, can not recover them from the attaching officer. *McNaughton v. Leonard* (Me.), 13 At. Rep. 584.

Messrs. AMOS MILLER and LANE & COOPER, for appellee.

We think the rule is now well settled that there must be an actual delivery of the possession of the property to the vendee to protect his title against an execution creditor, even though the plaintiff in the execution may have had notice of the sale. *Blatchford v. Boyden*, 122 Ill. 657; *Long v. Cockern*, 128 Ill. 30; *Johnson v. Holloway*, 82 Ill. 334; *Frank v. Miner*, 50 Ill. 444; *Lowe v. Matson*, 35 Ill. App. 602.

We invite the court's particular attention to this latter case as settling the questions raised in the case at bar.

In the case of *Curran v. Bernard*, 6 Ill. App. 543, the court uses this language: "If the property is permitted to remain with the vendor, the sale will be deemed fraudulent in law as to creditors and subsequent purchasers, although it may have been made in good faith and for an adequate consideration."

We shall not contend that cumbrous articles should be removed to constitute a delivery and change of possession. But there must be some act exercised over it as would make the vendee a trespasser if he had not purchased.

Boggs, J. On the 15th day of November, 1889, the appellee, then sheriff of Montgomery County, by virtue of an execution issued out of the Circuit Court of that county upon a judgment in favor of Joseph Weber and against William H. Whitman, levied upon a quantity of corn in four cribs or pens, as the property of the defendant in the execution. The corn had been raised by Whitman in the season of 1888, on a farm on which he resided, called the Simmons place, and was there cribbed by him. The appellant claimed that he had purchased the corn from Whitman about the 9th day of February, 1889, and demanded possession of it from the sheriff, which, being refused, he brought this action of replevin for its recovery. The judgment below, upon the verdict of a jury being against him, he brings the record to this court for review.

The issue presented by the pleadings and evidence is, was

the alleged purchase of the corn by the appellant fraudulent or not?

As against creditors, sales of personal property by verbal contract may be deemed fraudulent and voidable upon two distinct grounds: First, that the contract was entered into with fraudulent intent. Second, that by the rules of law a fraudulent intent is presumed from the nature and character of the transaction.

Of this latter class, are sales made when there is no change, actual or constructive, of the possession of the property.

If after the sale the property remains in the possession and control of the vendor as before the sale, the law conclusively presumes that the transaction is fraudulent as to creditors. *Lawson v. Funk*, 108 Ill. 502; *Johnson v. Holloway*, 82 Ill. 334; *Thornton v. Davenport*, 1 Scam. 296.

Where the articles sold are cumbrous or ponderous, so that a removal is not practicable, it is not necessary that there should be an actual change of possession from hand to hand, but it is sufficient if the buyer assumes the control of the property in an open and notorious manner, and the seller is divested of every species of possession from which an inference of ownership might arise.

When an actual change of possession is not practicable, the acts that will constitute a sufficient delivery as to creditors vary in the different classes of cases and depend upon the character of the property sold and the circumstances of each particular case. Whether all had been done that ought to have been done to constitute a delivery, is therefore largely a question of fact to be determined by the jury under proper instructions.

In the case at bar the corn was not moved from the cribs nor was it wholly paid for. Whitman continued in possession of the farm and was in the apparent possession of the cribs and corn when the levy was made. He exercised acts of ownership over the corn for several months after the sale, even to the extent of feeding some 300 or 400 bushels of it to his stock. There was nothing to indicate to the general public that the corn had passed out of his possession or control.

Hewett v. Griswold.

The jury were, we think, properly instructed as to the law governing the delivery of such property, and the evidence was sufficient, in our opinion, to justify the jury in finding that there was no such change of possession as the rules of law required. The sale was therefore fraudulent in law, and void as to creditors.

It is, however, urged by the appellant, that if a sale is otherwise valid, it is not to be deemed fraudulent at law on the ground alone that there was no sufficient delivery of the article sold, if the creditor had notice of the sale.

In order to present this view to the jury the appellant asked the following instruction:

(5) "The court instructs the jury that if they shall believe from the evidence that the plaintiff bought the corn in controversy from William H. Whitman in good faith and for a valuable consideration before the date of the execution in evidence before you, then the court instructs the jury that, even though there was no delivery of the corn by Whitman to plaintiff, still, that fact can not render the sale fraudulent, if the jury shall further believe from the evidence that the said Joseph Weber and the defendant had actual notice of said sale before the date of said execution."

The court refused to so instruct the jury, and such refusal is assigned as a ground for reversal.

If there was no delivery, the sale, as we have seen, is presumed by the rules of law to be fraudulent. * * *

That being so, it is immaterial whether the judgment creditor or the sheriff had actual notice of the sale. If they knew of the sale they also knew that the possession remained with the vendor and that therefore the sale was void. There is no difference in effect between a sale made with actual intent to defraud creditors, and one fraudulent in law. Notice of either is only notice of a fraudulent transaction not binding upon a creditor. Swift v. Thompson, 4 Conn. 63; Homer v. Gersman, 17 S. & R. 251; Lasseter v. Bussey, 14 La. An. 699.

Finding no error in the record the judgment must be affirmed.

Judgment affirmed.

O. C. STAFFORD

V.

A. C. SCROGGIN.

Justices—Jurisdiction of—Interpleader—Appeal and Error—Attachment.

1. Justices of the peace are courts of inferior and limited jurisdiction, and act only within the limits prescribed by statute.

2. The proceeding by way of interpleader authorized in courts of record, is not applicable to cases of attachment before justices of the peace.

3. In the case presented, this court holds that the justice in question must be presumed to have been acting under the provisions of Chap. 79, R. S., rather than under Sec. 29, Chap. 11, R. S., and that from his decision an appeal could only be taken by filing an appeal bond within five days.

[Opinion filed January 30, 1892.]

APPEAL from the Circuit Court of Logan County; the Hon. GEORGE W. HERDMAN, Judge, presiding.

Messrs. S. L. WALLACE and BEACH & HODNETT, for appellant.

Mr. JOE A. HORN, for appellee.

BOGGS, J. A constable of Logan County by virtue of an attachment writ issued by a justice of the peace of that county in favor of the appellee and against one John W. Swain, levied upon three colts as the property of Swain.

The appellant filed with the justice of the peace a written claim of ownership of the property levied upon, verified by his oath, and denominated an interpleader by his counsel.

The record of the justice does not disclose the course of procedure adopted upon the filing of this claim of ownership of the property, but it does appear that on the 28th day of January, 1891, the appellant and appellee were before the justice, and that he heard testimony and rendered a judgment against the appellant.

Fourteen days after this, the appellant prayed an appeal to the Circuit Court of Logan County and filed an appeal bond, and thus the cause came into the Circuit Court of that county, where the appeal was dismissed on the ground that the proceeding was in effect a trial of the right of property under the provisions of Chap. 79 of the Revised Statutes, from which an appeal can only be prosecuted by giving an appeal bond within five days after the rendition of the judgment. Sec. 102, Chap. 79, R. S.; *Rozier v. Williams*, 92 Ill. 187.

The appellant contends that the proceeding is an "interpleader" authorized by Sec. 29 of Chap. 11 of the statutes entitled, "Attachments in Courts of Record," and which, by force of the 18th section of that portion of the same chapter which provides for attachments before justices of the peace, is made applicable to attachments before justices of the peace.

Whether the provisions of the statute authorizing persons claiming property attached to interplead in courts of record, apply to attachments before justices of the peace, is the only question for our determination.

Justices of the peace are courts of inferior and limited jurisdiction and can act only within the limits prescribed by the statute.

The jurisdiction of such courts in attachment proceedings can not be extended beyond the prescribed limits of the statute, nor can it be exercised in any other manner than in strict accordance with the statute. Aside from the statute justices have no power whatever in such cases.

Courts of record convene at fixed periods, and a jury is provided ready for the call of the court whenever needed. The parties litigant, if served with process, are in court subject to its jurisdiction during the term of the court before their causes are disposed of, and the machinery, as it may be called, of the court, is adapted to the disposition of an interpleader in the speedy and summary manner contemplated by the statute providing such proceeding in such courts.

Justices' courts are in session only at such times as writs authorized by law to be issued are made returnable. No jury is present, nor can a jury be brought into a justice's court

except under some statute authorizing and empowering such course to be taken.

There is no statute providing for the issuance of any process upon the filing of an interpleader, nor statutory authority for the production before a justice of a jury to try the issue thus raised, nor for any course of judicial procedure in such cases. The general rule is that nothing is to be considered as within the jurisdiction of courts of inferior and limited jurisdiction, but what is expressly granted to them by the statute. The power and judicial functions of justices of the peace are such only as are given by definite and positive law. We do not think the proceeding by way of interpleader authorized in courts of record is applicable to cases of attachment before justices of the peace.

Secs. 98 to 103 inclusive, Chap. 79, R. S., entitled "Justices," etc., authorizes and provides a course of procedure for the trial before a justice of the peace of the claim of a person other than the defendant that he is the owner of property levied upon by an attachment writ as the property of the defendant.

It was authority thus given that the justice in the case at bar, it is to be presumed, was exercising, and from his decision an appeal could only be taken by filing an appeal bond within five days thereafter.

The action of the Circuit Court in dismissing the appeal was, we think, correct, and its judgment must be affirmed.

Judgment affirmed.

TRUSTEES OF SCHOOLS

V.

WILLIAM A. PEAK.

Principal and Surety—Debt on Bond—Township Treasurer.

1. All moneys that come into the hands of a township treasurer, as such, must necessarily be and remain there in contemplation of law and in the

Trustees of Schools v. Peak.

real sense of the bond given by him, as to the obligee, and for all the purposes of an action upon such bond until they are accounted for by some act or fact which legally discharges him from liability for them. Where they have thus come during a former term, and have not been so accounted for, they must be deemed to have come thence into his hands as treasurer for the one succeeding.

2. Not denying the fact that a balance is due from such officer, his sureties are estopped from denying it to be in his hands, and having voluntarily executed the bond, public policy would forbid that they should escape responsibility by showing that at and since the commencement of a given term he was never able to produce it.

3. The questions whether there was a balance due from such treasurer, and its amount, are not conclusively settled against the sureties upon his bond by the statement of the amount thereof in his report.

4. Even when accepted by school trustees, such report can hardly have the force and effect of a settlement, and such acceptance should not estop them from asserting error therein subsequently discovered.

5. Upon proof that a treasurer had received other moneys than those accounted for by him, school trustees can recover the same in an action on his bond, although their omission may have been entirely innocent on his part. Errors satisfactorily shown may ordinarily be corrected at law.

6. In the case presented this court holds, the treasurer being dead, that certain books and vouchers were admissible not only because they were the records of his official acts, which the law required to be kept, but because they were parts of the *res gestæ*, and for the further reason that they were as competent to prove a negative—that entries of alleged charges and credits were not made—as an affirmative.

7. It is not incumbent upon a surety to show how errors came to be made by his principal in such case; it is enough to satisfy the jury that moneys had been properly paid out by him for which he received no credit.

8. A treasurer is entitled to credit for school orders paid by him although the same may have been informal, the amount thereof being properly due for something received by the district.

[Opinion filed January 30, 1892.]

IN ERROR to the Circuit Court of Scott County; the Hon. CYRUS EPLER, Judge, presiding.

Mr. JAMES A. WARREN, for plaintiff in error.

Mr. JAMES M. RIGGS, for defendant in error.

PLEASANTS, J. Debt, against a surety on the official bond

of a deceased township treasurer, the other surety being also dead. Judgment on verdict for plaintiffs, in debt \$7,000, damages \$245.45. Being dissatisfied with the amount awarded, they sued out this writ of error.

The bond was executed May 31, 1886, upon the appointment of the principal, Jeremiah B. Bonebreak, made on the 5th of April preceding. He had then held the office continuously for several terms, and under that reappointment continued to hold it until May 21, 1888, when his successor qualified. At that time he was dying of consumption, and died a few days thereafter intestate. No letters of administration upon his estate were ever issued.

The substance of the declaration is, that during his last term he received as treasurer a large sum of money, and of it, had in his hands when his successor qualified, \$3,000, which he failed to pay over on demand and unlawfully converted to his own use, and that neither he nor his securities, or either of them, have ever paid it, though a like demand was made of the defendant, as one of said sureties, before the commencement of this suit.

The pleas traverse the averments of refusal to pay over, and conversion, and allege that Bonebreak paid out and accounted for all the funds of the township that came to his hands or under his control as such treasurer from the date of said bond to the time when his successor qualified; and the issue tried was whether he was then indebted as such treasurer and to what amount.

It appears that on April 5, 1886, at the regular meeting of the trustees, Bonebreak presented for settlement his treasurer's books, which showed a balance then in his hands of \$1,677.70, and he was thereupon reappointed.

On April 4, 1887, at their regular meeting, he again presented a statement of balances due the districts respectively, which aggregated \$1,788.41, and corresponded with the reports he made to the district directors; and it was shown that he afterward received, as treasurer, from the county collector and other sources \$3,040.29, making a total debit of \$4,828.70.

The books show credits for payments on account of the mine districts made after the balances above mentioned were struck, amounting to \$2,878.28. There was also oral evidence tending to show other payments by him after April 4, 1887, which were never entered on the books in October, November, and December, on school orders, of \$345; and a few days before his death, on other orders, of \$400.42.

These credits together would reduce the apparent balance to \$1,205; to which should be added, for error in one of the footings, \$100, making \$1,305.

Defendant was allowed to go back of the report of April 4, 1887, and introduce thirty school orders, running in date from February, 1880, to January, 1887, amounting in all to \$1,040.50, and in connection with them the treasurer's books from the earliest of those dates, for the purpose of showing that for these orders he had never given himself any credit; and also about three hundred and fifty other orders, on some of which small amounts of interest appeared to have been paid, which it was claimed had not been entered to his credit, though the principal had.

The credits thus claimed, exclusive of the amount for interest, would reduce the balance to \$264.50, being only \$19.50 more than was found by the verdict. What these items for interest aggregated we have not taken the pains to ascertain from the multitude of the orders, but assume that it was at least as much as this difference.

Plaintiffs objected to this evidence when offered, and excepted to the ruling of the court admitting it. They insist that the treasurer's report of April 4, 1887, was conclusive upon him and his sureties as to the amount then due, and cite for this contention *Morley v. Town of Metamora*, 78 Ill. 394; *City of Chicago v. Gage*, 95 Ill. 626; *Longan v. Taylor*, 130 Ill. 412.

Those were actions, like this, upon the official bond for the last of several terms held in immediate succession by the same treasurer. In an official report made during that term and pursuant to the statute, he stated the balance against himself from the preceding term as on hand. The condition of these

bonds is, in substance, that the treasurer will properly pay over or account for all moneys that shall come to his hands, as such, during the term for which the bond is given; and the sureties in these cases, not denying that their principal was a defaulter, that the balance reported was due, nevertheless claimed as a defense for themselves that the defalcation occurred and the money was squandered during the preceding term, and so was not actually in his hands during the one covered by their bond. It was held under these circumstances, that this claim was inadmissible; that the treasurer's report was conclusive on that point.

We agree that the soundness of the decisions is no more open to debate than is their authority. All moneys that come into the hands of the treasurer, as such, must necessarily be and remain there, in contemplation of law and in the real sense of the bond, as to the obligee, and for all the purposes of this action, until they are accounted for by some act or fact which legally discharges him from liability for them. Where they have thus come during a former term, and have not been so accounted for, they must have come thence into his hands as treasurer for the one succeeding. We apprehend that the ground on which these decisions rest is not the conclusiveness of the treasurer's statement, but on the fact, however made to appear, that a balance was due from the treasurer, that he had received moneys, as treasurer, for which he had not accounted. There is no special force in the words "on hand" or "in the treasury." They add nothing to the statement of the balance. Because it ought to have been on hand, in the treasury, having been there and not properly paid out or otherwise accounted for, it is conclusively presumed to have remained there. Not denying the fact that a balance was due, the sureties are estopped to deny that it was in the treasurer's hands. The trustees rightfully presumed that whatever was due was in his hands, and accepted the bond as security for its proper application. The sureties could have satisfied themselves as to its amount and the ability of the treasurer to produce it when he ought; and having voluntarily executed the bond, public policy would forbid that they should escape responsi-

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bility by showing that at and since the commencement of that term he was never able to produce it. Had the trustees known it they might have refused to reappoint him and sued on the former bond; but they were not bound to know or to presume it, and the sureties on that bond may have got beyond reach or become insolvent; nor did they rely on his ability, but took security. The sureties did so rely. On grounds of public policy, therefore, they should not be permitted to make this defense. It would be a fraud upon the trustees and might work serious injury.

In the cases cited, the question before the court was not whether there was a balance due, nor what was its amount, but whether it was in the treasurer's hands at the time stated. But that is not the question here. It was admitted that whatever balance was due from the treasurer at the close of the preceding term, in contemplation of the law and of the bond sued on, came to his hands as treasurer during the term covered by it, and that for his failure to pay over to his successor, or otherwise account for that balance, the defendant, as his surety, is responsible. The questions sought to be made were whether there was such a balance and of what amount. Are those questions conclusively settled against the surety by the statement of the amount in his principal's report?

A majority of this court are inclined to the opinion that the Supreme Court, notwithstanding some broad expressions *arguendo*, has not so decided, and that on principle it ought not to be so decided. No such reason as estops the principal to deny his statement that the balance due was actually in his hands applies to his statement of the amount of that balance. That is but a statement of the difference between the sums of the items debited, and those credited on the account as stated by him. It is in no sense a contract or evidence of a contract. It works no change in previously existing facts. It creates no obligation, invests no interest, transfers no right. Its correctness as a statement depends on that of the debits and credits, which are but receipts and charges made and given by the treasurer alone, and in their nature subject to correction for error in favor and at the instance of anybody who would other-

wise be injured. Even when accepted by the trustees, the report can hardly have the force and effect of a settlement. Settlements ascertain the balance between those who were parties to the several transactions stated in their respective accounts, and may, therefore, be alike presumed to know the facts. Thus the balance is ascertained from mutual admissions, which have the more weight because of this presumption and of the deliberation with which they are made; and hence also the settlement is just as binding upon the one as upon the other. Yet even such settlements are not conclusive upon either, because of the known liability to error, especially from omissions.

But here the trustees were not parties to the transactions reported by the treasurer. They paid no money to him nor received any from him, and the balance really due belonged, not to them, but to the people of the respective districts. For what they can know of the completeness and correctness of his account in such cases, they must depend, to a greater or less extent, upon his statement. It is hardly practicable for them to go to all the sources from which he might have received school moneys, or to ascertain for themselves the genuineness and truth of his vouchers. For these reasons their acceptance of his sworn statement ought not to estop them from asserting error therein against the districts subsequently discovered. Upon due proof that he had actually received other school moneys than those so accounted for, we have no doubt they could recover it in an action on his bond, although its omission may have been entirely innocent on his part. And having shown its receipt, what better, or indeed what other primary evidence could be offered to show it had not been accounted for, than his vouchers and book entries from the date of its receipt?

If their acceptance and approval of his account would not conclude them, why should its statement conclude him? That it was made under oath and in pursuance of a statutory requirement would not impart to it the character of a contract or conveyance, which would require the power of a court of chancery to correct, and only upon proof that the mistake was

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mutual. It remains, in fact, what it otherwise would have been, the statement of an account. These circumstances and others here appearing, the lapse of time and intervening settlements since the alleged errors occurred, may add to its weight as evidence of the actual balance, and require stronger and clearer proof to warrant correction; but they do not make it conclusive. If errors are satisfactorily shown they should still be corrected, and by a court of law, if no right of third parties has intervened or positions been changed or conduct induced, which would make it unjust. *Eddie v. Eddie*, 61 Ill. 134; *Town v. Wood*, 37 Ill. 512; *Aultman & Co. v. Graham*, 29 Ill. App. 77.

Had the statement, as presented and accepted on April 4, 1887, been completed on the 1st, and on the 2d the treasurer had paid a proper school order for \$10, which he had inadvertently omitted to enter, can it be doubted that he or his surety would have had the right to produce the voucher and his books, and have the correction made to his credit? The difference between that case and this is one of degree only and not of kind. In *Cassady v. Trustees of Schools*, 105 Ill. 560, the Supreme Court say that the treasurer's books, being such as the law requires to be kept, and constituting the official record of his acts, "are therefore, on general, well recognized principles, admissible in evidence for or against all persons having any interest in such entries, or the facts to which they relate, including the treasurer and the sureties on his bond," citing authorities. It is not intimated that a "settlement" has the effect to shut out all anterior entries, and we perceive no reason why it should, especially where the question is as to the correctness of the settlement. The suit was upon the last of several successive bonds, which was executed on the 29th of March, 1887, and about the 27th of June next following, the treasurer was removed for cause. It is to be inferred that he presented his books and accounts and settled on entering upon that term. The defendants objected to the books showing his receipts and disbursements, as entered by him prior to the execution of the bond sued on, but the Supreme Court held their admission proper, say-

ing, as quoted, that they were admissible for and against the treasurer and his sureties. In this case the treasurer being dead, we are of opinion that they were admissible, not only because they were the records of his official acts, which the law required to be kept, but because they were parts of the *res gestæ*. Lawrence v. Stiles, 16 Ill. App. 494 *et seq.*, and the authorities there cited. And further that they were just as competent to prove a negative—that entries of alleged charges and credits were not made—as an affirmative. Furness v. Cope, 5 Bing. 114; Bank v. Boreaf, 1 Rawle, 152; Nourse v. McKay, 2 Rawle, 70; Bank of Monroe v. Culver, 2 Hill, 552; McLean Co. Bank v. Mitchell, 88 Ill. 52. For the reason of the rule see Am. Notes upon Smith's Leading Cases, Vol. 1, (top) p. 506 (6th Am. Ed.).

Here the treasurer may not have been a good bookkeeper, nor of methodical business habits. His duties as treasurer called him to action only occasionally and irregularly. He had other business that engaged him generally. His health was infirm, for how long a time does not appear, and he died of a lingering disease only a few days after his successor was appointed. He was in no condition, after that appointment, to look over and settle the affairs of his office. One book that he kept was not turned over, nor found after his death. Demand was made upon the appellee, his surety, for \$2,216.77, based upon the balance stated in the account of April 4, 1887, modified only by subsequent transactions, not all of which had been entered on the books. Appellee was certainly justified in looking into the books and outside to ascertain the correctness of that balance and of the amount demanded of him. Having obtained permission to examine the books and vouchers turned over to the successor, he procured the assistance of an expert accountant, and with him went through and compared them from the beginning. The result was that they found among the canceled vouchers the thirty orders here in question, for which they claim they could find no entry of credit on the books, either separately or included in any that were entered. That they were all proper orders, and that he actually paid them, is not denied or doubted. He

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should therefore have had credit for them. If really errors they were not wilfully made against his own interest. He may have made these payments when and where it was not convenient to enter them, mislaid the vouchers, and forgotten them when he came to write up his books. But it was not incumbent on the surety to show how the errors came to be made. It was enough for him to satisfy the jury that his principal had in fact paid the orders and had not credited himself with them. Appellee came into court disputing, not his liability for the balance actually due from the treasurer, but the amount of that balance. The claim of appellants was based upon the balance reported April 4, 1887, which was ascertained and struck from data appearing on the book. Appellee claimed that these data were incomplete, and that, supplying the credits omitted in error, it should be greatly reduced. He offered to submit to the jury for their closest scrutiny the vouchers he claimed to have been omitted, and the books to show such omission, with the testimony of the accountant who had examined and compared them. We think this evidence was rightly received.

This disposes of the principal question of law in the case. Appellants complain of the admission in evidence of the other orders, on some of which it appeared that interest had been paid, which it was claimed was not credited, in connection with the instruction given that in finding the balance actually due the jury should consider all the vouchers and book entries, on the ground that some of these orders were on accounts for which the law did not allow interest. But the jury was fully instructed, in accordance with the views of appellants, as to what accounts would lawfully draw interest. It can not be presumed that the jury allowed for the payment of interest upon any orders that did not lawfully draw it, and we do not see how they could determine whether the items of credit claimed to have been omitted were in fact omitted, without having all the vouchers before them for comparison with the book entries.

It is said also that some of the orders admitted were signed by the clerk of the board of directors only, while the statute

required that they should be signed by the president or by a majority of the board as well; and a decision of the Supreme Court is cited (*Glidden v. Hopkins*, 47 Ill. 525), holding that an action could not be maintained upon an order so drawn. Certainly the treasurer would not be bound to pay it; but if he did pay it, notwithstanding its informality, and the amount was really due for that which the district had actually received, we think he should be allowed credit for it. According to our recollection there were but two of that form, each for a small amount, and the justice of the claims was not denied.

Upon the questions of fact, the least satisfactory of the findings of the jury was as to \$665 of the \$2,878.28, credited on the books for payments on account of the several districts made after the settlement of April 4, 1887, as follows:

District No. 1, D. Ward.....	\$ 60 00
District No. 3, J. B. Bonebreak.....	230 00
District No. 3, H. L. Mason.....	150 00
District No. 6, Lottie Borum.....	75 00
District No. 7, G. W. Riley.....	150 00
	<hr/>
	\$665 00

It is denied that he paid either of these items or any part of either. Mr. Baird, his successor, testified that he, as treasurer, paid an order in favor of Ward, dated April 20, 1887, for \$59.82, which is assumed to be the one first above mentioned; that of the second (to Bonebreak) he paid one for \$80, and another for \$150 is still in the bank unpaid; that he paid all those issued to Mason, being five, for \$50 each; that he paid one for \$40 to Lottie Borum, which must have been part of the sum credited to himself by the deceased treasurer; that there were issued to Riley only six orders, for \$50 each, and he paid them all, and that therefore the item of \$150 credited by the deceased treasurer as having been paid to him must have been fictitious.

This testimony imputes to the dead treasurer the grossest and most deliberate fraud, practiced while he was almost *in extremis*. Yet no reflection is cast upon the honesty and integrity of his previous life. He had charged himself most

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faithfully with all that he had received, and his errors, if they were errors, were against himself. His entries of credit were competent evidence for himself and his sureties. His vouchers and books (with one exception) were turned over to his successor, upon short notice of his removal and before he could have had time, in the condition of his health, to revise and fraudulently alter or add to them in his own interest. The names, dates and amounts given in these orders, were certain means to convict him of the fraud if any had been committed. How he could get these particulars, the most of which are shown to have been correct, and none positively shown to have been incorrect or fictitious, unless the orders were presented to him, does not appear. These circumstances certainly give some additional weight to his entries.

On the other hand it is noticed that his successor did not state that orders for these items were not among those turned over to him, nor whether he paid those he claims to have paid, to the payees therein named. No one of these payees was produced to show of whom he or she received payment. The two orders to Bonebreak were payable to his order, and yet neither was indorsed. He might well have credited himself with them without indorsing them, if he surrendered them to his successor; but that a banker should cash and receive one so made, without his indorsement, would be strange.

If they were paid twice, they must have been wrongfully reissued by, or wrongfully obtained from Bonebreak or Baird, and could have been by or from one as well as the other. These circumstances certainly tend in some degree to weaken the testimony of Baird as against the book entries of the man whose lips were sealed by death against explanation. They were doubtless discussed at large before the court and jury who saw and heard the witnesses. It was an important question of fact in the case. To us, who had not their advantages, the finding either way might not be satisfactory. The jury gave credit to the entries. The judge saw no sufficient reason for interfering with their conclusion. We think it would be unprofitable to undertake a discussion and comparison of the weight of the facts and arguments relied on by the parties

respectively. We are by no means clear as to what would be a just conclusion. Had the jury found for the plaintiffs as to these disputed items and the judge refused to disturb it, we should have been content with that result. If appellants have sufficient confidence in their views as to the main question of law involved to take the case to the Supreme Court, we should be quite willing to have that tribunal pass, if they think they lawfully may, upon this question also.

We see nothing in the action of the court below upon the instructions asked to call for comment. A very large number were given for plaintiffs, covering all the phases of the case as they claim it, and we see no substantial error in those given for defendant, or in the refusal or modification of any asked for plaintiffs. The judgment will therefore be affirmed.

Judgment affirmed.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FOURTH DISTRICT—AUGUST TERM, 1890.

MOBILE & OHIO RAILROAD COMPANY
V.
JOHN KLEIN.

Railroads—Negligence—Personal Injuries—Contributory Negligence by Passenger—Jumping from Train—Evidence—Instructions—Res Gestæ.

1. The law requires that carriers of passengers shall exercise the highest degree of practicable care and diligence consistent with the mode of transportation used, in protecting the latter from injury.

2. In an action brought to recover from a railroad company for injuries alleged to have occurred to a passenger through its negligence, he having jumped from the train in question, this court holds, in view of the evidence, that the judgment for the plaintiff can not stand.

3. In the case presented, this court holds as improper the admission in evidence of certain alleged declarations of servants of the railroad company touching the condition of the road and the liability of the company, the same not being a part of the *res gestæ*.

4. To recover in such case plaintiff must have been in the exercise of ordinary care when injured.

[Opinion filed February 26, 1892.]

APPEAL from the Circuit Court of St. Clair County; the
Hon. WILLIAM H. SNYDER, Judge, presiding.

MESSRS. LANSDEN & LEEK, for appellant.

MR. CHARLES P. KNISPEL, for appellee.

PHILLIPS, P. J. On the 12th day of January, 1887, the appellee became a passenger on appellant's train, which consisted of an engine, two coaches and a baggage car, attached in the order of engine, baggage car, smoking car and rear coach; near the station of New Hanover the hind trucks of the rear coach left the rails and in that condition ran about four hundred and fifty feet, when that coach became detached and rolled down the embankment; there were two trucks under each coach, and four wheels to each truck; one pair, the forward wheels on the front truck of the smoking car, were off the rails; appellee was in the smoking car, and after the rear coach became detached and was within one hundred feet of the car in which he was sleeping, he jumped from the car, and receiving no external injury, claims to have been injured internally, and brought suit for damages within a few days of two years after the accident.

The evidence shows the engine driver was competent, and handled his train with care, and it was equipped with the Westinghouse air-brake, the car wheels of good make and inspected the day before, and in good condition, and at the place where the trucks left the track the ties were new, sound ties, with new standard gauge steel rails, and the track was inspected a few minutes before the accident and found in good condition. The train was running about eighteen miles per hour at the time of the accident. Shortly thereafter, the track, on examination, was found to be in gauge and in line, and in neither the condition of the wheels, cars or track were any patent or latent defects discovered, though an effort was made by the train men to find what caused the trucks of the rear coach to leave the rails. The jury found a verdict for appellee for \$1,400. The plaintiff's right of action is in the *prima facie* case made by proof of his being a passenger and the accident and injury. The case is a close one on the facts and it is important that in the admission of evidence and the

instructions of the court, the jury should be confined to proper testimony and a correct statement of the law. A witness, Conrad Steffenauer, was permitted to testify over the objection of the defendant that the company knew that was a dangerous place, because the section men told him it was an awful place to work at; that it was a pretty hard place to keep up.

The defendant called as a witness W. M. Williams, the claim agent of the company, who testified in chief to visiting the plaintiff after he instituted suit and having a conversation with him about the accident and as to how and when he, the plaintiff, got off the train. This witness was, on cross-examination, over the objection of the defendant, permitted to be asked whether he had a conversation with one Emge while going or returning from plaintiff's house, and stated to him, Emge, that he, the witness, was satisfied the company was legally liable, and whether he did not further say that he had visited the place of the accident and it appeared to him the company was legally liable, and he was willing to settle without a law suit, and on the witness answering in the negative, the plaintiff then called Emge, who was permitted to testify over the objection of the defendant that Williams made to him the statement, that he, Williams, had visited the place of the accident and from information he had received from them was of opinion the railroad company was bound to pay damages. The statement of section men to Steffenauer of their opinion that the place of the injury was a dangerous one to work at, and the opinion of the witness Williams that the company was bound to pay damages, were not a part of the *res gestæ* and were not competent evidence, and these declarations were well calculated to be very damaging to defendant's case. It was error to admit in evidence these declarations. *Teal v. Meravey*, 12 Ill. App. 32; *M. C. R. R. Co. v. Gougar*, 55 Ill. 503; *M. C. R. R. Co. v. Carrow*, 73 Ill. 348. The court, at the request of the plaintiff, gave to the jury three instructions as follows:

"1. The court instructs the jury that a railroad company carrying passengers for hire is bound to use the utmost care

and skill, and if injuries are sustained by a passenger lawfully on the train, caused by the want of such care and skill, the company is liable in damages to such injured party."

"2. The court further instructs the jury that if they believe from the evidence that the train of defendant ran from the track as stated in the declaration, then such running off the track is *prima facie* evidence of negligence of the company, and the burden of disproving negligence is thrown upon the company."

"3. The court instructs the jury that the fact that the plaintiff jumped from the cars, while they were in motion, to the ground, and thus sustained injury complained of, will not deprive him of a right to recover against defendant, if the jury believe from the evidence that the accident alleged in the plaintiff's declaration had occurred, that the cars were running off the track, and that the plaintiff had reasonable ground to believe and did believe and had reason to believe that his life or limbs were in danger, and that it was necessary to leap from the cars in order to avoid the danger which threatened him."

These instructions assume to state the law which gives a right to the plaintiff to recover. It is held in *Tuller v. Talbot*, 23 Ill. 357: "While courts in announcing the rule governing common carriers of persons have said that they must be held to the utmost degree of care, vigilance and precaution, it must be understood that the rule does not require such a degree of vigilance as will be wholly inconsistent with the mode of conveyance adopted, and render its use impracticable, nor does it require the utmost degree of care which the human mind is capable of inventing. * * * But the rule does require that the highest degree of practicable care and diligence shall be adopted that is consistent with the mode of transportation used." In *Heazle v. T. B. & W. Ry. Co.*, 76 Ill. 501, an action brought by a passenger against the carrier, it is said: "By special verdict the jury found that plaintiff was guilty of greater negligence than defendant. In what particular is not stated, but doubtless the jury believed plaintiff, in the midst of the confusion of the sudden shock occasioned by the accident, left his seat, and on attempting to jump from the train, sustained injuries; just how the injury to

plaintiff was produced no one can tell. He was found at the bottom of the culvert when the train was stopped, severely injured. How he got out of the car is one of the questions in the case. He must have gone out voluntarily either before or after the accident, or else he was thrown out by the violence of the motion of the cars. The latter theory is the one insisted upon by plaintiff, but this theory of the case seems almost incredible.

“The night was cold and all the witnesses agree the doors and windows of the car were closed. When it was discovered the cars were off the track, the conductor enjoined it upon all passengers to remain in their seats. No one saw plaintiff leave the car; he has no recollection himself as to how he got off. His impression is, if he had jumped off he would have remembered it. Why he would be more likely to remember jumping off, than being thrown off the cars, is not easy to comprehend. No other passenger was seriously injured. We are inclined to adopt the view the jury must have taken of the case—that plaintiff must have gone out of the car either just before or after it was discovered to be off the track. His seat was the third from the door and it is unexplainable how he could have been thrown out of the cars however violent the motion, with the windows and doors all closed just before the accident happened. If he attempted to leave the car after it was discovered it was off the track, it was imprudent in the extreme. Had he remained in his seat it seems more than probable he would have sustained no injury. Although plaintiff has suffered very great injury we see no ground on which to base a recovery. It was through no fault of defendant or its agents or servants. They omitted no duty imposed upon them by law or by a due regard for the safety of passengers. Everything connected with the train was in good order and it was managed by skillful and prudent operators. The track had been constructed with skill and care, and in the opinion of a competent engineer the road was as safe as it could reasonably be constructed. It was patrolled at frequent intervals by a careful inspector and found to be in order with no defects discoverable.” The facts in the case last cited, and the facts

in this case are very similar. In that case, as in this, the plaintiff jumped from the train, and in none of the instructions for the plaintiff is it made a condition precedent to a right of recovery that he was in the exercise of ordinary care on his part. The third instruction places the right of recovery on the sole ground of there being an accident, and that plaintiff jumped from the car and was injured, regardless of the question as to whether the defendant was in any manner guilty of negligence, and regardless of the question as to whether the plaintiff was in the exercise of the same care when he jumped from the train, as would have been exercised by a man of ordinary care and prudence under the circumstances. For the errors indicated, the judgment is reversed and the cause remanded.

Reversed and remanded.

PEORIA, DECATUR & EVANSVILLE RAILWAY COMPANY

V.

A. F. ATEN.

SAME

V.

JOHN F. ATEN.

Railroads—Negligence—Killing of Stock—Fences—Gate at Farm Crossing—Signals—Failure to Sound.

1. Failure to comply with the statute concerning signals by a railroad company will not justify a judgment against it in an injury case, unless it appears by the facts and circumstances preponderating, that the accident was the result of such neglect.

2. Evidence that tracks of a horse or horses apparently made while running, were seen on the road-bed after the accident, is not sufficient to authorize a verdict of guilty of negligence in the management of a given train in an action brought to recover for the killing of horses, through the alleged negligence of a railroad company.

3. Evidence going to show that such train was going at a high rate of speed does not necessarily import negligence.

4. Where it is contended that animals were injured through failure to

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properly fence, the pivotal point is, as to the condition of the fence where they went upon the track. There can be no recovery if such place was properly fenced.

5. This court holds as proper the admission of evidence in the case presented, touching the condition of a fence at places other than where the horses in question went upon the track, the same being insufficient to turn hogs.

6. An instruction not based upon evidence adduced should be refused.

[Opinion filed February 26, 1892.]

APPEAL from the Circuit Court of Jasper County; the Hon. C. C. BOGGS, Judge, presiding.

An action was brought by A. F. Aten for killing stock, and another action of the same nature was brought by John F. Aten. Several counts of each declaration allege the killing of hogs, while other counts allege the killing of one horse belonging to A. F. Aten, and the killing of three horses belonging to John F. Aten. The horses were killed at about the same time, and on trial it was stipulated by the parties that both causes should be tried together and the jury find separate verdicts, and that both causes might be heard in the Appellate Court on one record, and that the decision of the Appellate Court might apply to both cases, the evidence being the same except as to damage for killing hogs. The field from which the horses escaped was on the east side of, and separated from, the right of way by a fine wire fence of the kind in common use. It had been constructed several years before and was in good condition for all kinds of stock at the time of this accident, except at two places; one, where a ditch passed under it, and the other, where, by the washing out of the bank of a creek, which extended along between the fence and railroad track, eight or ten posts had dropped down and were standing upright in line against the bank, then eight feet high. At the former place it was about three feet from the lower wire to the bottom of the ditch; at the latter place, the fence was standing upright, and held in place by the wires. The adjoining field had been used as a stock pasture for three weeks prior to the time in question, during which the mares

ran there every nice night, and the colts all the time. The two defects mentioned had existed for about eight years, during which a horse had not been known to escape through them; seven or eight years ago a farm crossing was put in, and a gate built in the fence connecting the pasture with the right of way. The planks in the crossing were subsequently removed, but the gate remained. A year before the accident a new gate was substituted, and was in good repair at the time the horses were killed. It was a sliding gate of the construction in general use on farms, with the same fastenings and as complete as any other gate of that pattern.

In the evening of December 27, 1889, J. F. Aten turned the horses into this pasture by a gate opening from the public highway. The gate in the right of way fence was then closed. Other witnesses saw the gate closed at about the same time. Between ten and eleven o'clock of the same evening William Pippin, in passing through there, found the gate open and setting around into the field about four feet. He left it as found. The horses escaped to the railroad track, and between twelve and one o'clock of the same night were struck and killed, or injured, by the north bound freight of defendant. The next morning John F. Aten found the horses lying along the right of way, and the gate open as described by Pippin. An examination of the ground was made by different witnesses for the purpose of determining how the horses got upon the track, but no marks or indications of any kind whatsoever could be found, except at the open gate, where many horse tracks were discovered. The declarations charge negligence in not constructing and keeping in repair sufficient fences or sufficient gates at farm crossings, and negligence in the operation of the train. There were one or more horses on the right of way which were not struck by the train, and the evidence shows that tracks of horses, running, were found on the road-bed, but what horses made the tracks is not shown, nor whether more than one horse was running. The engineer testifies that when he first discovered the horses they were about at the road crossing at the gate, and when he first saw them could not tell what it was; did not know but that it was

a man; when he got nearer saw what it was, and called for brakes. "As I came nearer I noticed more than one horse and pulled the engine over on its end, reversing the engine and using the steam the opposite way; used sand to keep the engine from slipping; did not know how many horses were struck; did not see any horse running ahead of the engine before they were struck; when I saw this horse, she was standing across the track; don't know whether I struck her or not; she passed out of my sight; saw another one about the same time. When I got through with these two, another one ran upon the other side of the track ahead of the engine; that was after seeing the first two, and pretty close to the crossing. The last horse jumped on the track by the time I got there. I could not have kept a better lookout as we went north if I had forty eyes; didn't see the horse until it jumped on the track ahead of the engine; when she jumped on the track, we were close enough to frighten her, but she got off; she was headed right across the track; that was the first time I saw the horses. There was nothing I could have done that I did not do to stop the train."

While the engineer testified that he sounded the whistle, witnesses for the plaintiff testify that no bell was rung nor whistle sounded. Verdict and judgment was rendered for the plaintiffs on all the counts of the declarations.

MESSRS. GILSON & JOHNSON and STEVENS & HORTON, for appellants.

Plaintiffs were bound to prove by a preponderance of the evidence that the defendant was guilty of negligence in running its train. T. H. & I. R. R. Co. v. Tuterwiler, 16 Ill. App. 197; R. R. I. & St. L. R. R. Co. v. Connell, 67 Ill. 216; I. C. R. R. Co. v. Bull, 72 Ill. 537; P. D. & E. Co. v. Duggan, 10 Ill. App. 233.

The testimony that tracks were discovered extending along the railroad for some distance south of where the horses were found, without proof that the horses were running ahead of the engine when the tracks were made, and that the engineer could have seen them so running, is no proof at all. R. R. I. & St. L. R. R. Co. v. Connell, 67 Ill. 216.

Plaintiffs' case is not supported by the statement of witness (Lyda) that the train was running fast. *T., W. & W. Ry. Co. v. Barlow*, 71 Ill. 640; *W., St. L. & P. Ry. Co. v. Neikirk*, 13 Ill. App. 387.

Nor by testimony that the train gave no signals that night for a considerable distance. *T. W. & W. Ry. Co. v. Barlow*, 71 Ill. 640.

Since, if such facts were established, it did not appear that the damages resulted therefrom, and they were not material to the issues. *T. H. & I. Co. v. Jenuine*, 16 Ill. App. 209; *St. L. V. & T. H. R. R. Co. v. Hurst*, 25 Ill. App. 181.

The plaintiffs failed to establish, by a preponderance of the evidence, that the horses got upon the track because of a defective fence or gate, which they were bound to do to warrant the finding of the jury against the defendant on that issue. *Wabash Ry. Co. v. Brown*, 2 Ill. App. 516; *C., B. & Q. R. R. Co. v. Farrelly*, 3 Ill. App. 60; *G. W. R. R. Co. v. Morthland*, 30 Ill. 451.

The defendant performed its duty in constructing a gate of the kind in general use. *C. & A. R. R. Co. v. Buck*, 14 Ill. App. 394.

Even if the gate had been defective, defendant was not liable, since the horses did not get upon the track because of the defects, but because some one left the gate open during the night. *I. C. R. R. Co. v. McKee*, 43 Ill. 119; *T. H. & I. R. R. Co. v. Tuterwiler*, 16 Ill. App. 197.

Under the evidence, the horses escaped to the right of way through a gate left open during the night, which, in any view, was a casual breach for which defendant was not liable. *C. & N. W. R. R. Co. v. Barrie*, 55 Ill. 226; *C., B. & Q. R. R. Co. v. Sierer*, 13 Ill. App. 261; *I. & St. L. R. R. Co. v. Hall*, 88 Ill. 388.

The court erred in admitting evidence upon the following points:

1. Of the condition of the fence at places other than where the horses got upon the track. *C., B. & Q. R. R. Co. v. Farrelly*, 3 Ill. App. 60.

2. Of the conversations between plaintiff and the section

foreman, and of notice given to him in reference to farm crossing. C., B. & Q. R. R. Co. v. Kennedy, 22 Ill. App. 314.

3. Of the failure to give signals at other places, or highway crossings. W., St. L. & P. Co. v. Neikirk, 13 Ill. App. 387; C. & E. I. R. R. Co. v. McKnight, 16 Ill. App. 596.

It was error to instruct the jury that plaintiff could recover, if defendant's servants were negligent, without limiting it to acts or omissions charged in the declaration. W., St. L. & P. Ry. Co. v. Coble, 113 Ill. 115; C. & A. R. R. Co. v. Bragonier, 119 Ill. 51; St. L., A. & T. H. R. R. Co. v. Berger, 9 Ill. App. 341; Kranz v. Thieben, 15 Ill. App. 483.

Especially without proof that injury resulted therefrom. St. L., V. & T. H. R. R. Co. v. Hurst, 25 Ill. App. 181.

The court erred in assuming defendant's negligence in the ninth instruction. I. C. R. R. Co. v. Zang, 10 Ill. App. 594.

The instructions for plaintiff on the insufficiency of the fence and gate were erroneous, because there was no evidence that the horses escaped by reason thereof. St. L., V. & T. H. R. R. Co. v. Hurst, 25 Ill. App. 181; Wenger v. Calder, 78 Ill. 275; C., B. & Q. Ry. Co. v. Morkenstein, 24 Ill. App. 128.

They should have been modified to cover the fact that the horses got through an open gate. W., St. L. & P. Ry. Co. v. Rector, 104 Ill. 296; C., B. & Q. Ry. Co. v. Seirer, 60 Ill. 295; C., B. & Q. Ry. Co. v. Magee, 60 Ill. 529.

Messrs. FITHIAN & JACK, for appellees.

"A railroad company in running its trains is liable for the killing of stock which gets upon the track, not only when the killing of such stock results from the gross or wilful negligence of the company or of its servants running the train, but also when it results from the want of ordinary care." Illinois Central Railroad Co. v. Middlesworth, 46 Ill. 494.

"Negligence is the opposite of due care and prudence. It is the omission to use the means reasonably necessary to avoid injury to others, and is not a legal question, but one of fact, to be proved like any other question." C. & A. R. R. Co. v. Pennell, 94 Ill. 448.

“In suits to recover damages caused by negligence, the question of the plaintiff’s negligence in failing to use proper care, and the degree of negligence in either party, is usually, if not always, a question of fact for the jury.” *I. & St. L. R. R. Co. v. Evans*, 88 Ill. 63.

“In an action against a railroad company to recover the value of cattle alleged to have been killed on defendant’s road by their locomotive and train, it appeared that the cattle could have been seen on the track by the engineer, if he had been on the lookout, for a distance of more than half a mile; there was nothing to obstruct his view, and yet, with the stock standing on the track in full view, the engineer made no effort to avoid the danger, and never slackened the speed of train, but rushed on at a rapid rate, without any signal to give the alarm; held, it was gross negligence on the part of the engineer not to stop the train in time to avoid the danger, for which the company should be held responsible, even though the cattle were upon the track without the fault of the company.” *C. & N. W. R. R. Co. v. Barrie*, 55 Ill. 226; *R. R. I. & St. L. R. R. Co. v. Irish*, 72 Ill. 404.

The case of the *R. R. I. & St. L. R. R. Co. v. Connell*, cited by counsel, is not applicable to this case. The right of way was not inclosed but open to the common. The evidence failed to show what train killed the mule; whether the accident occurred in daylight or at night. The evidence in this case shows the train that killed the horses, the time of the killing, and that the tracks on the road-bed were made by these horses while fleeing from the train. The right of way is inclosed. No other horses had been on the right of way or could have got on it. The tracks indicate clearly that the horses had been running and are continuous to the first horses struck and continuous from the first horses around the bridge back onto the road-bed to where the dun mare was knocked off of the track, and just at this point they fail to be continuous.

“It is the peculiar province of the jury to pass upon the credibility of the several witnesses,” and “where the evidence as to the disputed facts of a case is contradictory, it is for the jury to determine which side is most worthy of belief,

and their finding in such a case must settle the controverted facts." Conn. M. L. Ins. Co. v. Ellis, 89 Ill. 516; Rogers v. The People, 98 Ill. 581; Morgan v. Ryerson, 20 Ill. 343; Creote v. Willey, 83 Ill. 444; P. D. & E. R. W. Co. v. Babbs, 23 Ill. App. 454; I. & St. L. R. R. Co. v. Evans, 88 Ill. 63.

"Where the evidence, on the trial of an action against a railroad company for killing a colt, tended to show that the colt ran on the track in front of an advancing train, before it was struck and killed, for a distance of twenty-five or thirty rods, and the track was straight, so that the engine driver, by the exercise of reasonable diligence, could have discovered it in time to have slackened the speed of the train so as to have avoided the accident, a verdict finding the company liable for the value of the colt may be properly found, notwithstanding the evidence is conflicting." P. & D. R. R. Co. v. Mullins, 66 Ill. 526.

PHILLIPS, P. J. From the facts appearing in this record there is not a preponderance of evidence showing the defendant guilty of negligence in the management of its train, even if the bell was not rung or the whistle sounded as required by the statute. No recovery could be had for that cause unless it was made to appear by facts and circumstances preponderating, that the accident was the result of such neglect. Quincy, Alton & St. Louis R. R. Co. v. Wellhoener, 72 Ill. 60; Terre Haute & Indianapolis R. R. Co. v. Tuterwiler, 16 Ill. App. 197.

The evidence that tracks of a horse or horses, apparently running, were seen on the road-bed, is not evidence sufficient to authorize a verdict of guilty of negligence in the management of the train.

In the case of the Rockford, Rock Island & St. Louis R. R. Co. v. Connell, 67 Ill. 216, it was said: "The manner of the killing is not described by any witness. The only facts relied on to charge the company, other than the killing itself, are that tracks supposed to have been made by the mule were discovered on the road-bed for a distance of a hundred and fifty yards from where it was struck, and leading in the

same direction, and the tracks indicated the mule had been running. The evidence affords no explanation as to when the tracks were made, whether as this train was advancing, or at a time anterior. There is not a fact or circumstance proven that shows or even tends to show the engineer saw, or by the exercise of reasonable diligence could have seen the mule in time to stop or even slacken the speed of the train so as to have avoided the accident."

What is said in that case is applicable to the evidence in this; what horse made the tracks, whether the black horse that escaped injury or those killed, is not shown. The time the tracks were made is not shown, nor that the engineer, by the use of reasonable diligence, could have avoided the accident. The case of *Chicago & N. W. R. R. Co. v. Barrie*, 55 Ill. 227, is not an authority in point; there it was proven the cattle on the tracks were seen or could have been seen by the engineer in time to have avoided the injury. This record contains no such evidence. Nor would the fact that the train was running at a high rate of speed be evidence of negligence. *Toledo, Wabash & Western R. R. Co. v. Barlow*, 71 Ill. 640; *Wabash, St. Louis & Pacific Ry. Co. v. Kirk*, 13 Ill. App. 387.

The evidence shows that the road was fenced and the injury occurred at a place where it was the duty of the company to fence the road; but it is insisted by the plaintiff that the fence and gate were not sufficient to turn stock. The primary question and the precise fact to be considered is, as to where the horses went upon the right of way. *Great Western Railroad Co. v. Hanks*, 36 Ill. 284; *T., P. & W. Ry. Co. v. Darst*, 51 Ill. 365; *Alsop v. O. & M. Ry. Co.*, 19 Ill. App. 292.

At no place where the evidence shows the fence to have been out of repair, is it shown that the horses passed onto the right of way, and the witnesses state if they had passed down the bank, along the ravine and under the wire, it would have been evidenced by the tracks of the horses, and at no place where the horses could have passed on the right of way were tracks found, except at the gate; that the conclusion is irresistible, that it was at that place the horses went upon the right of way. The gate was of a kind in general use and

was in good repair and fastened in the manner that kind of a gate is usually fastened. It was closed when the horses were put in the field, and from the evidence it is apparent it was left open by some person passing during the evening. No negligence of the company is shown with reference to the closing and manner of fastening the gate, and it being casually left open during the night, because of which the horses escaped on the right of way, is not negligence on the part of the company that would authorize a recovery. *C. & N. W. R. R. Co. v. Barrie, supra*; *I. & St. L. R. R. Co. v. Hall*, 88 Ill. 368; *C., B. & Q. R. R. Co. v. Sierer*, 13 Ill. App. 261.

And however the question may be as to the sufficiency of the fence and its condition of repair, the horses did not get upon the track by reason of any defects of the fence; and the condition of the fence could not give the plaintiff a right to recover for the horses. *I. C. R. R. Co. v. McKee*, 43 Ill. 119; *T., H. & I. R. R. Co. v. Tuterwiler, supra*. It is insisted that the court erred in allowing evidence as to the condition of the fence at places other than where the horses got upon the track. While that is the material question with reference to the right of recovery for the horses (*C., B. & Q. R. R. Co. v. Farrelly*, 3 Ill. App. 60), still the counts of the declaration which charged the killing of hogs at other times, authorized the admission of evidence as to the condition of the fence at places other than where the horses went on the track, the condition of the fence being insufficient to turn hogs; the recovery on the counts for killing the hogs was proper. The second instruction given for the plaintiff is: "The jury are instructed, as a matter of law, that if a railroad company or its servants fail to perform a duty prescribed by statute, such failure is negligence of itself, provided it is the proximate cause of any injury to the person or property of another." No person saw the injury unless it be the engineer, and he testified he sounded the whistle, and there is not a particle of evidence showing the injury resulted from the omission to sound the whistle or ring the bell, and the jury could not have understood this instruction as pertaining to anything other than an omission to ring the bell or sound the whistle; hence there

was no evidence on which to base that instruction. Objection is made to certain other instructions for plaintiff which would be well taken if nothing was involved but the horses; yet, as other stock was killed at other times, the exceptions to other instructions are not well taken. For the errors indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

OHIO & MISSISSIPPI RAILWAY COMPANY

V.

CHARLES THILLMAN.

Railroads—Negligence—Flooding of Farm Lands—Solid Embankment—Evidence—Instructions—Extraordinary Flood.

1. A railroad company is bound to bring to the construction of its works a degree of engineering skill that will permit no negligent and improper construction.

2. The common law duty of a railroad company is to so construct its road, where it crosses a water-course, as not to impair the usefulness thereof.

3. Such duty is a continuing one, and each overflow caused by the negligence or want of skill of the company, creates a new cause of action for damages suffered, and this is so, although the party injured acquired his interest after the creation of the obstruction.

4. It is for the jury to determine from the evidence whether a flood was an extraordinary one, but the court may give the jury a legal test by which to apply the evidence and determine the fact.

[Opinion filed February 26, 1892.]

APPEAL from the Circuit Court of St. Clair County; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Messrs. POLLARD & WERNER, for appellant.

Messrs. TURNER & HOLDER, for appellee.

43	78
43	118
43	78
143	127

PHILLIPS, P. J. This is an action to recover damages for flooding lands and destroying crops, resulting from constructing and maintaining a solid embankment obstructing the natural flow of water. The facts of the case with reference to the embankment and the flooding of lands by reason of its construction, are the same as in the cases of *O. & M. Ry. Co. v. Elliott*, 34 Ill. App. 589; *O. & M. Ry. Co. v. Singletary*, 34 Ill. App. 425; *O. & M. Ry. Co. v. Rainey*, 39 Ill. App. 409. In this case the evidence as to the rainfall is, the same flood is alleged to have caused injury in 1885, as that in the Elliott and Singletary cases, and the same to have caused injury in 1888, as in the Rainey case. In these cases the facts were held sufficient to warrant a verdict and judgment for the plaintiff; that the assignment of error in this case, that the verdict is contrary to and against the evidence, is not sustained. Objection is made to the instructions given for the plaintiff, which are:

1. "The court instructs the jury that it is the duty of a railroad company so to construct and maintain its road across streams and natural water-courses which it intersects as to inflict no injury upon adjacent lands."

2. "The court further instructs the jury that this duty is a continuing one, and that each overflow caused by the negligence or want of skill of the company creates a new cause of action for damages to the crops or other property of the rightful possessor of the lands overflowed, although the plaintiff acquired his interest after the creation of the obstruction; and if the jury believe from the evidence that a portion of the water of the 'Little Canteen Creek' naturally flowed south across the right of way of the defendant prior to the filling up of the trestle, and would still continue to do so excepting for the obstruction of the embankment complained of, then they must find for the plaintiff, giving such damages as the jury can say from the evidence that he has sustained, if they further believe from the evidence that he has sustained damage by reason of said embankment and partial obstruction of the flow of the water aforesaid."

3. "The court instructs the jury that floods which occur

as much as twice in five years are not, in law, such extraordinary floods as will prevent a recovery of damages caused by such floods from the person or persons who by negligent or unlawful acts contribute to such overflows."

A railroad company is bound to bring to the construction of its works a degree of engineering skill that will permit no negligent and improper construction. It is said in *C. B. & Q. R. R. Co. v. Schaffer*, 124 Ill. 112, "The statute giving the right to cross streams of water requires the company to restore the stream to its former state, or so as to leave its usefulness unimpaired. This makes it necessary to have the channel as free and unobstructed as it was before." The common law duty owing by the defendant is to so construct its road where it crosses a water-course, as not to impair the usefulness of such water-course. The facts before the jury were as to the construction of a solid embankment across a natural water-course, and under these facts the first instruction was not erroneous; the second instruction is based on the same facts and states a correct rule as to a continuing duty. Objection is made to the third instruction, and it is urged that the court should not have defined an extraordinary flood. It is for the jury to determine from the evidence whether a flood is an extraordinary one, but the court may give the jury a legal test by which to apply the evidence and determine the fact. We are not disposed to hold the rule given was an improper one. The judgment is affirmed.

Judgment affirmed.

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2058 *460

OHIO & MISSISSIPPI RAILWAY COMPANY

V.

WILLIAM M. ATTEBERRY.

Railroads—Negligence—Injury to Stock—Evidence—Practice—Witnesses.

1. A jury has not the right from mere whim or caprice to reject the testimony of an uncontradicted and unimpeached witness.

O. & M. Ry. Co. v. Atteberry.

2. In an action brought to recover from a railroad company for the killing of stock, the same being alleged to have occurred through its negligence, the report of the section foreman to the company and his opinion as to the cause of the injury is not competent testimony.

[Opinion filed February 26, 1892.]

APPEAL from the Circuit Court of Wayne County; the Hon. C. C. Boggs, Judge, presiding.

MESSRS. POLLARD & WERNER and CREIGHTON & COOPER, for appellant.

MESSRS. HANNA & HANNA, for appellee.

PHILLIPS, J. This is an action brought by appellee to recover damages for a horse alleged to have been killed on appellant's road. A verdict and judgment were entered for the plaintiff for \$150. The evidence shows the horse was tied to a tree in an inclosure about seven o'clock on the evening of July 26, 1889, and broke loose and escaped from the inclosure and went upon the road-bed of appellant's road and ran down the track about one-eighth of a mile to a trestle, on which he went and fell or was thrown off the trestle into a pile of rock about eight feet below and was killed. The plaintiff claims the horse was struck by the locomotive and killed, while the defendant claims the horse was not struck, and insists that he ran into the trestle and fell from it and was killed by the fall, and at the time no train was near him. From the evidence, but one train had passed when the horse was found dead, from the time he had been tied to the tree until he was found dead under the trestle on the afternoon of the 27th of July. No one saw the injury and the only question in the case is whether the horse was in fact killed by the train. In I. C. R. R. Co. v. Whalen, 42 Ill. 396, where an action was brought to recover damage for animals alleged to have been killed by a train, it was said:

"There was no positive proof the animals were struck by the locomotive, but the presumption is strong they were, as

they were found by the side of the road badly smashed up, and no other reasonable cause could be assigned for the casualty." In *C. & N. W. Ry. Co. v. Dement*, 44 Ill. 75, an action was brought to recover damages for a cow alleged to have been killed by the train; the cow was found lying in the ditch two or three feet from the track, and it was said in that case: "We do not consider this a case in which we can set aside the verdict as unsupported by the evidence. It is certainly singular that the cow if killed by the train, bore no external marks of violence, but on the other hand the place where she was found dead raises a strong presumption that she had been killed by one of the several trains proved to have passed over the road the night before. Here was a mode by which the doubt could be explained, and no other cause is shown to have existed which would have explained it." In neither of these cases was any other cause found that could account for the position and condition of the animals killed and their death, than on the theory that they were struck by a train. In this case the evidence shows that the horse came on and ran rapidly down the road-bed as testified from the appearance of the foot prints of the horse until he reached the trestle, when, the witnesses testify, "It looked as if the horse had scraped the ground before he got on to the bridge." On the first few ties from the end on the track no marks were found, but between the rails after the first few ties, a distance of twelve or fourteen feet from the end of the bridge, hair was scraped from the horse to the point where he went off. If the horse ran rapidly down the road-bed to the trestle, and there, not being able to stop, jumped onto the trestle and fell through between the ties, and struggled until he fell off the bridge, here was a cause which could be assigned for the casualty and would explain it. In this respect this case is unlike the cases above cited, and it can not be said there is on these facts a preponderance of the evidence showing the horse was killed by the train. The case of *Railway Co. v. Ritter*, 16 S. W. Rep., is directly in point. It further appears that the only train passing that could have caused the injury passed about seven o'clock in the morning of the 27th of July.

At that time it was after the sun was up. The engineer and fireman on the engine hauling that train both testify that they saw no horse at that trestle, and the engineer testifies that he struck no horse. These witnesses are unimpeached and uncontradicted as to the material facts testified to by them, and unless their testimony is rejected entirely by the jury, it makes a complete defense to plaintiff's claim, and it is apparent that the jury rejected their testimony. A jury has not the right from mere whim or caprice to reject the testimony of an uncontradicted and unimpeached witness. The circumstantial evidence is entirely consistent with their testimony. From all the facts proven, the verdict in this case manifestly and at first blush is not sustained by the evidence. The plaintiff offered in evidence the report of the section foreman, in which the foreman expressed the opinion that the horse was killed by the train, which was objected to and the objection sustained, and the plaintiff assigns cross-error for sustaining the objection to this evidence. The report of the foreman to the company and his opinion as to the cause of the injury was not competent testimony. The cross-error is not sustained. The judgment is reversed.

Judgment reversed.

PEORIA, DECATUR & EVANSVILLE RAILWAY COMPANY
V.
CHARLES JOHNS.

Master and Servant—Railroad Company—Negligence of—Engine out of Repair—Personal Injuries—Evidence—Instructions—Damages—Services of Wife to Husband—Sec. 8, Chap. 68, Starr & C. Ill. Stats.—Special Findings—Fellow-servants.

1. The evidence in a given case being conflicting upon material points, the instructions should be accurate, or, taken as a series, the jury should thereby be correctly informed what the law is, as applicable to the facts proven.

2. A plaintiff in a personal injury case, to maintain his action, is not required to establish by the proof all the material averments in all the counts of the declaration; he need prove the material averments of one count only.

3. An instruction failing to require the jury to base their findings on the evidence, should not be given.

4. Nor one setting forth that a railroad company failing to keep in good repair and *safe condition* its engines and machinery, whereby one of its employes is injured, is liable therefor, such employe, when injured, being in the exercise of reasonable care and prudence.

5. In view of Sec. 8, Chap. 68, Starr & C. Ill. Stats., a wife is not entitled to payment for services rendered her husband, while ill through injuries suffered during the course of his employment; and in an action brought to recover from the employer therefor, the jury should not be instructed that the ministrations of the wife should be considered in the estimation of damages.

6. In the case presented, this court holds that a locomotive engineer and a laborer were not fellow-servants, in the sense that the master would not be liable for an injury to the latter, occurring through the negligence of the other.

7. The consequences of an engineer's neglect to report the defective condition of an engine are not assumed by a laborer accepting employment upon the road. He is not bound to inform himself whether such report has been made, or whether the engine was in good repair.

[Opinion filed February 26, 1892.]

APPEAL from the Circuit Court of Richland County; the Hon. W. C. JONES, Judge, presiding.

Messrs. HUTCHINSON & LYNCH and STEVENS & HORTON, for appellant.

Messrs. J. S. PRITCHETT, W. A. CULLOP, C. B. KESSINGER, and J. I. MOUTRAY, for appellee.

GREEN, P. J. Appellee brought this suit to recover damages for personal injuries alleged to have resulted from the negligence of appellant in furnishing and using an engine worn and out of repair in hauling cars loaded with rails to be distributed along the line of its railway for the repair of track. The ground for recovery *is not* negligence on the part of the servants of appellant while operating and using the engine.

The amended declaration consisted of three counts, in each of which it is in substance averred that plaintiff was a servant of defendant, and while engaged in the line of his employment as a laborer, in unloading rails from a car to the ground, in the exercise of due care and caution, and without knowledge of the defective condition of the engine, which defective condition was then known to defendant, said engine was started and by reason of the defective condition the servants in charge thereof could not control its movement, or stop it, and by reason of such defects it pushed said car violently and forcibly against him, and thereby he was knocked down and his foot was caught between the wheel of the car and the track and was run over, mashed and injured.

In the first count, the specific defects averred are that the throttle-valve was out of repair, and steam escaped, and the pressure of escaping steam prevented the engineer from using the reverse lever in controlling and directing the engine. And the notches in the levers, used in starting, stopping, managing and directing the speed and motion of the engine, were so worn, broken and out of repair, that the same could not be controlled, managed or directed by the servants then in charge thereof. In the second count, it is averred the throttle-valve, steam pipes and levers of the engine were out of repair; and in the third count it is averred the steam valves of the engine were so worn and defective that they leaked steam badly, whereby it became impossible for defendant's servants in charge thereof to control the motion of the engine.

Issue was taken and joined on the amended declaration, and the cause was tried thereon. The jury found defendant guilty and assessed plaintiff's damages at \$3,125. Defendant's motion for a new trial was overruled, judgment was entered on the verdict, and it took this appeal. We shall not discuss the question of fact involved except to remark the evidence is conflicting upon material points, and hence the instructions should have been accurate, or, taken as a series, the jury should thereby have been correctly informed what the law was as applicable to the facts proven.

Appellant insists that the trial court erred in giving several

instructions for plaintiff whereby the jury was misdirected to the injury of the defendant, and an unjust verdict was the result. Twelve instructions were given on his behalf, and all of them, except the second, ninth, tenth and eleventh, are claimed to be erroneous. The first of these instructions is not obnoxious to the objections made. The material facts averred in the declaration and necessary to be proven in order that *each count* should be maintained, are stated fully in the instructions, and the jury are told, if plaintiff has proven by the preponderance of evidence all these material averments, he is entitled to recover. This instruction in fact imposed a greater burden of proof upon the plaintiff to maintain his action than the law does, because by it all the material averments in all the counts were required to be established by the proof, in order that plaintiff could rightfully recover, whereas the law is that he need to have proven the material averments of one count only.

"The court should always instruct that if the facts involved in the issue are proved, reciting them, then they should find for the party in whose favor they shall find the facts." *Frame v. Badger*, 79 Ill. 442. In this instruction no prominence is given any particular fact involved, but the jury are directed if they find the recited material facts relied upon for recovery have been proven by a preponderance of the evidence, then they should render a verdict in plaintiff's favor.

The second instruction does not require the jury to base their findings on the evidence, and is erroneous.

We find no serious objections to plaintiff's third and fourth instructions, when viewed in connection with defendant's instructions given to the jury. The fifth instruction informs the jury if the railroad company failed to keep in good repair and *safe condition* its engines and machinery, and as a consequence an employe, in the exercise of reasonable care and prudence, is injured, the company would be liable. This is not the law as we understand it.

The sixth instruction, although not free from objection, is intended to inform the jury that plaintiff, who was a laborer

employed in unloading rails from a car, was not bound to inspect the engine, or inquire whether it was in good repair before engaging in the work assigned him, but had a right to do such work, relying upon the company to perform its duty and use reasonable care to furnish an engine suitable and safe for moving and operating the train. The jury doubtless understood this to be the meaning of the instruction.

The seventh instruction is objectionable for the same reason as the fifth. We do not think the jury were misled or misdirected to the prejudice of defendant by instructions eight and eight and one-half.

The twelfth instruction was clearly erroneous. By it the jury were told in estimating the plaintiff's damages and as an element thereof they could include the necessary expenses of nursing him. Plaintiff testified it was his wife who nursed him, and was permitted to further testify that her services for nursing him were worth \$5 per week. He was under no legal obligation to pay for such services, nor had she the right at law to recover therefor. Sec. 8, Chap. 68, S. & C. Ill. Stats. provides: "Neither husband nor wife shall be entitled to recover any compensation for any labor performed, or services rendered for the other, whether in the management of property or otherwise." See, also, *Hazelbaker v. Goodfellow*, 64 Ill. 238; *Cunningham v. Hanney*, 12 Ill. App. 437.

The jury thus erroneously instructed might, and doubtless did assess as part of plaintiff's damages the sum of \$5 per week from December to April 1st, in violation of law and to the injury of the defendant. It is also insisted on behalf of defendant that the court should have rendered judgment for defendant because of the special findings of the jury in answer to two written interrogatories submitted to them by the court. One was, "Was not the engine in good repair in the particulars mentioned, when it started on the road from defendant's shops at Mattoon for the work in question?" The other was, "If the engine became defective after it left the shops, was it not the engineer's duty to notify the master mechanic, and did he not fail to do so?" The jury answered "Yes" to each of these questions. But the special findings in answer to preceding

interrogatories of the series submitted to the jury, show clearly to us that the defective condition of the engine or its appliances, and not negligence in operating same by those then in charge thereof, was found by the jury to have caused the injury to plaintiff. The material question in this connection then is, was the negligence on the part of the engineer in failing to report to the master mechanic the condition of the engine, such negligence on the part of a fellow-servant of plaintiff as to relieve defendant from liability?

This question, in our judgment, must receive a negative answer. Conceding it to have been the duty of the engineer to so report the defective condition of the engine, and that he failed to do so, and hence it was not repaired, but in such defective condition was used, and its movements for that reason could not be regulated or controlled, and thereby plaintiff was injured, yet it can not be fairly insisted the relation of fellow-servant subsisted between plaintiff and the engineer at any time other than when plaintiff was actually co-operating with him in the same line of employment, or their usual duties brought them into habitual association, and with respect to the condition of the engine at the time of the injury or the neglect of the engineer to make such report, these were matters over and concerning which plaintiff had no right of supervision, and in respect whereof the relation of fellow-servant did not subsist between them.

The doctrine in regard to the liability of the common master is thus stated in *N. C. Rolling Mill Co. v. Johnson*, 114 Ill. 57: "That servants of the same master, to be co-employees, so as to exempt the master from liability on account of injuries sustained by one, resulting from the negligence of the other, shall be directly co-operating with each other in the same line of employment, or that their usual duties shall bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of a proper caution, the relation between the servants must be such that each as to the other, by the exercise of ordinary caution, can either prevent or remedy the negligent act of the other, or protect himself against its consequences."

O. & M. Ry. Co. v. Town of Bridgeport.

In our judgment the consequences of the engineer's neglect to report the defective condition of the engine was not a hazard assumed by plaintiff when he accepted the employment of laborer, nor was he bound to inform himself whether such report had been made, or whether the engine was in good repair, but had the right to pursue his employment of unloading rails, and rely upon the appellant to perform the legal duty imposed upon it, to use reasonable care to furnish an engine safe and suitable to be used in moving and operating the train. Our views upon this branch of the case are sustained by the case last cited. *U. S. Rolling Stock Co. v. Wilder*, 116 Ill. 100; *C. B. & Q. R. R. Co. v. Avery*, 109 Ill. 314; *Tudor Iron Works v. Weber*, 31 Ill. App. 306. For the errors mentioned in giving instructions for plaintiff instructing the jury and admitting the evidence touching the nursing by plaintiff's wife, the judgment is reversed and cause remanded.

Reversed and remanded.

OHIO & MISSISSIPPI RAILWAY COMPANY

V.

THE TOWN OF BRIDGEPORT.

Railroads—Liability to Municipality for Cost of—Erection of Bridge—Highways.

1. A railroad company, whose road is built across a highway, owes the duty of restoring the same to its former condition, or in a sufficient manner as near as may be, so not to materially impair its usefulness, and this is a continuous duty.

2. A railroad company is under no obligation to build or keep in repair a road or bridge on its right of way, unless the same is rendered necessary by the construction of the railroad.

3. The duty of a railroad company does not end with the construction of approaches to a bridge and crossings, and keeping the same in repair. When there is a change of condition it is bound to conform to new circumstances and conditions arising in the future, in altering such places from time to time as it becomes necessary.

43	89
63	226
43	89
71	445

4. In an action brought by a municipality to recover from a railroad company a sum expended in the erection of a bridge over a stream running parallel with said railroad, and upon its right of way, said bridge being a portion of a street, this court holds that the verdict for the plaintiff is against the law and the evidence, and that the same can not stand.

[Opinion filed February 26, 1892.]

IN ERROR to the Circuit Court of Lawrence County; the Hon. W. C. JONES, Judge, presiding.

Messrs. POLLARD & WERNER, for plaintiff in error.

Messrs. FOSTER & MCGAUGHEY, for defendant in error.

PHILLIPS, P. J. This is an action of assumpsit to recover for money laid out and expended for the building of a bridge across a creek which runs parallel to the track of the railroad in the town of Bridgeport. The bridge is part of a public highway which is the main street of the village, crossing the right of way of the railway company. At the time the railroad was built, in 1854, there was a bridge over the creek at the place in question. At that time, the distance from the nearest bank of the creek to the nearest rail laid on defendant's track was about thirty feet, and the track was about ten feet above the ordinary bed of the creek. The creek is entirely on the right of way of the road. From the time the railroad was constructed, the municipal authorities have maintained the bridge and the railway company have maintained the crossing on the railroad. In 1887 a new bridge was constructed by the municipality, and this action is brought to recover the cost of building the same. The railway company owes the duty of restoring existing streets or highways which the railroad crosses to their former condition, or in a sufficient manner, as near as may be, so not to materially impair their usefulness. It is a continuous duty inseparable from the enjoyment of the structure to keep that crossing in repair. *I. C. R. R. Co. v. The City of Bloomington*, 76 Ill. 447; *The People ex rel., etc., v. The C. & A. R. R. Co.*, 67 Ill. 118.

When the railroad company has complied with that duty, its obligation ceases unless there be a change of condition. It owes no duty of building or keeping in repair a road or bridge on its right of way, unless such bridge is rendered necessary by the construction of the railroad.

The evidence shows that before the construction of this railroad a bridge was necessarily constructed across the creek at substantially the point where it now is, and was a necessary structure to enable the public to travel along the highway. If the railroad was removed, it would be still a necessary structure to be kept up, to enable the public to travel that highway. The construction of the railroad, in and of itself, in no manner affected the necessity for the bridge, for that was the same before as since its construction. The fact that the bridge is on the right of way of the railroad company imposes no additional duty on the company. At the time the railroad was built, a bridge was necessarily across the stream, and from the end of the bridge an approach to the railroad track was constructed and a crossing put in on the railroad. It appears that approach to the road from the bridge was very steep, yet it was used by the public for years. A new bridge was constructed by the municipality and raised higher than the old one, and the approach to the railroad was much less steep and more convenient for the public. The duty of the railroad company did not end with the construction of the approaches and the crossing and keeping the same in repair. When there is a change of condition it is bound to conform to new circumstances and conditions arising in the future, in altering crossings and approaches from time to time, as it becomes necessary.

Finally the present bridge, for the cost of building which this recovery is sought to be had, was erected and built high enough to be almost on a level with the railroad. From almost the time the highway was laid out, a bridge across the stream was a necessity not imposed on the municipality by the construction of the railroad; hence, owing to the fact that the construction of the railroad necessitated the building of an approach from the end of the bridge, and when constructed it was steep, but still used by the public, and rendered so it

could be traveled, the railroad company had, under all the surroundings, restored the highway to its former condition, as near as may be, so as not to materially impair its usefulness. It owed no duty of constructing the bridge. The verdict of the jury finding the railroad company was liable for the cost of its construction is against the law and the evidence. The defendant asked the court to give to the jury the following instruction: "The court instructs the jury that even though you may find from the evidence that the construction of the railroad made it necessary to construct and maintain the bridge over the creek at the place in question at a higher level than before the railroad was built, that fact would not make the railroad company liable for the cost of the present bridge and approaches thereto as sued for," which the court refused to give as asked, but modified by adding: "Unless you believe from the evidence such bridge was necessary to be built in order to make approach to said crossing accessible," and gave the same as modified, to the modification of which the defendant excepted. From what has been said, that modification was erroneous.

The judgment is reversed and the cause remanded.

Reversed and remanded.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAIL-
WAY COMPANY

V.

GEORGE ABNEY.

Railroads—Negligence—Killing of Cow—Failure to Fence—Station Grounds.

There can be no recovery from a railroad company for the killing of stock within the limits of unfenced station grounds, the same being required to be open for the convenience of the public, no negligence except failure to fence being alleged.

[Opinion filed February 26, 1892.]

43	92
47	321
43	92
53	635

C. C. C. & St. L. Ry. Co. v. Abney.

APPEAL from the Circuit Court of Saline County; the Hon. O. A. HARKER, Judge, presiding.

Messrs. BOYER & CHOISSEY, for appellant.

Mr. A. W. LEWIS, for appellee.

PHILLIPS, P. J. The appellee, as plaintiff, brought suit to secure damage for a cow killed on defendant's railroad. The evidence shows that Carrier Mills is a station on the railroad of defendant, comprising a hamlet consisting of a hotel, post-office, three or four stores and a small collection of houses with a population of from one hundred and fifty to two hundred inhabitants. At that station was a depot and side track, which side track was used by the public and the company in loading and unloading freight on the road "from time to time, every day or two, for the year round," as testified to by the plaintiff's witnesses. Within the limits of that side track and depot the cow was killed by a train passing in the night time on defendant's road. No negligence is charged to the defendant, except the failure to fence its track and station grounds at the place where the injury occurred. From the evidence, the side track was used by the public and the company in loading and unloading freight from time to time, every day or two, for the year round. In the case of C., B. & Q. R. R. Co. v. Haus, 111 Ill. 114, the court cites numerous decisions from other States and says: "It has been held in such cases that the railroad company is not bound to fence up such part of its depot grounds as are required to be open for the convenience of the public in the use of the road." In that case the court further held: "It is the duty of a railway company to establish depots, etc., and so operate its road as to afford the public reasonable safety and dispatch in its transaction of business. To effect this and to accommodate those traveling its road or transacting business with the company, it is necessary that it should at all reasonable times provide a ready and convenient means of access to its stations and depots. To require these places to be fenced would cause delay and inconvenience to the pub-

lie and detract from the public character of railways." The evidence shows the side track was used by the public and the company in loading and unloading freight, and when so used the company is not bound to fence its track at the station grounds. C., B. & Q. R. R. Co. v. Haus, *supra*; L. E. & St. Louis Con. R. R. Co. v. Scott, 34 Ill. App. 635.

The cow went upon the track within the limits of the station grounds and was killed. Under the facts appearing in this record the judgment must be reversed and the cause remanded.

Reversed and remanded.

THE SOUTHEAST & ST. LOUIS RAILROAD COMPANY

v.

WILLIAM N. STOTLAR.

Railroads—Negligence—Rate of Speed—Personal Injuries.

1. To walk upon a railroad track without looking in both directions to discover approaching engines or trains, where the exercise of such precaution would discover the one or the other, is such negligence as will prevent a recovery for injury suffered, unless the injury was wilfully or wantonly inflicted.

2. The reckless conduct of the plaintiff upon the occasion of his injury precludes a recovery in the case presented.

[Opinion filed February 26, 1892.]

IN ERROR to the Circuit Court of St. Clair County; the Hon. B. R. BURROUGHS, Judge, presiding.

This is an action on the case brought by defendant in error against the plaintiff in error to recover for personal injuries received by him while on the track of the road of the plaintiff in error, he being struck by an engine of the Louisville & Nashville Railroad Company. The evidence shows that the track of the railroad is parallel to and adjoining Fourth street,

in the city of East St. Louis, and separated from the street by a ditch from two to three feet deep, and five to six feet wide at the top, and where the track is parallel with the street it is two to four feet above the level of the street. The defendant in error was driving some hogs from the depot of the Cairo Short Line road to the stock yards in East St. Louis. The hogs were being driven along Fourth street, where it is parallel to the railroad, and his own testimony is, that he walked along that track for a quarter of a mile and some hogs crossed over the main track of the railroad and went under some cars standing on a side track north of the main track and he stooped under these cars and moved along in that position twenty or thirty feet looking under the cars on the side track for his hogs, when he was struck and injured. It appears from his evidence that noise was being made by an engine near on another road blowing off steam, and while he was so on the track he did not look back to see whether any train was approaching.

One witness, Frank Siebring, called by the defendant in error, states that the defendant in error was driving hogs along Fourth street, and some of them got across the track and went under the cars on the side track and he, defendant in error, followed them, crawled under the cars after the hogs, ran around the cars one car length and came through under the cars and put one foot on the main track and did not take more than two steps when he was struck by the engine and knocked off. This last witness is corroborated by a witness, Tavey Owens, called by defendant in error. This is the only evidence in the record as to the circumstances of the striking. The defendant in error files his declaration containing one count, and the allegation in that is as follows:

“For that, whereas, the defendants, on the 21st day of April, 1886, owned and were operating a certain railway in said city and had a part of their main track running along, immediately joining Fourth street of said city, a much traveled thoroughfare, which track, by right, should have been fenced and separated from said street in order to avoid accidents and injuries to persons using said street by the operation of defendants’ said rail-

way; and plaintiff avers that an ordinance of said city was then in force limiting the speed of locomotives to five miles an hour; and the plaintiff further avers, that while he was then and there driving a lot of hogs, cattle and sheep, commonly called live stock, on and along said Fourth street, with due care and diligence, a portion of said stock unavoidably ran and got upon said track, and while the plaintiff was diligently endeavoring to drive said stock off said track, and back on said street, a certain locomotive of defendants, running at a high rate of speed, to wit, twelve miles an hour, was recklessly and wilfully driven against the plaintiff, and struck him with great violence," etc.

There was no evidence introduced in regard to the existence of such an ordinance as alleged. The Ohio & Mississippi Railroad runs for some distance parallel to the road of plaintiff in error, and the space between the two roads is filled in with switches at and near the point where defendant in error was injured. At about the time the defendant in error was injured, a train was passing on the Ohio & Mississippi Railroad, in an opposite direction to that which struck the defendant in error on the road of plaintiff in error. The weight of proof shows the train was not running to exceed from six to eight miles an hour. The engineer saw a hog across the track and a man cross and go under a car on the side track some two hundred or three hundred feet ahead of his engine, but did not see him come from under the car, though he kept a close lookout in front of the engine. The evidence is that a person coming on the track within fifteen or twenty feet of the engine can not be seen by the engineer from his cab.

The train could have been seen more than four hundred feet, and the smoke stack of the locomotive for more than six hundred feet from the point where the collision occurred.

Mr. J. M. HAMILL, for plaintiff in error.

Mr. M. MILLARD, for defendant in error.

PHILLIPS, P. J. Numerous errors are assigned on this

record, but we deem it necessary to consider only the question as to whether the defendant in error exercised that degree of care and caution for his personal safety that an ordinarily prudent man would have done in like circumstances. If we take his own evidence as disclosing the facts, he was walking on the track of a railroad near where there were other roads on which trains were passing, making great noise, and he did not look back or exercise any caution to avoid danger. If we take the testimony of other witnesses who witnessed the accident, he came from under a car and started to walk along the track and used no precaution to ascertain whether an engine or train was approaching. There is no evidence tending to show that the employes of plaintiff in error wantonly or wilfully caused the injury.

It has been repeatedly held that to walk upon the track of a railroad without looking in both directions to discover approaching engines or trains, where the exercise of such precaution would discover either the one or the other, is such negligence as will preclude a recovery unless the injury be wilfully or wantonly inflicted by defendant. *Austin v. C., R. I. & P. R. R. Co.*, 91 Ill. 35; *C. & A. R. R. Co. v. Gretzner*, 46 Ill. 82; *Blanchard v. L. S. & M. S. Ry. Co.*, 126 Ill. 416; *C. & N. W. R. R. Co. v. Sweeney*, 52 Ill. 325; *C., B. & Q. R. R. Co. v. Van Patten*, 64 Ill. 510; *C., B. & Q. R. R. Co. v. Damerell*, 81 Ill. 450; *C., R. I. & P. R. R. Co. v. Bell*, 70 Ill. 106; *L. S. & M. S. R. R. Co. v. Hart*, 87 Ill. 529; *I. C. R. R. Co. v. Hetherington*, 83 Ill. 510; *I. C. R. R. Co. v. Hall*, 72 Ill. 222.

The reckless conduct of the defendant was such negligence that it will preclude a recovery. The judgment is reversed.

As a result of the finding of this court in finding the facts as not sustaining a cause of action, the following facts are incorporated in this record:

The plaintiff in error was not guilty of the negligence charged in the declaration. The injury received by the defendant in error was the result of the want of ordinary care on his part.

THE AMERICAN CENTRAL INSURANCE COMPANY

V.

WILLIAM H. SIMPSON.

Fire Insurance—Policy—Conditions—Written Contract—Reformation of—Propositions of Law.

1. A court of law can not reform the contract in question, although the evidence introduced would justify a court of equity in so doing.

2. An insurance company can not retain a policy belonging to a person insured, and in case of loss, insist that he be governed by the terms thereof as to proofs of loss.

3. An insurance company can not, in case of loss, require the policy holder to appear with his books and accounts at its office in another State, there to be subjected to an examination under oath.

4. A policy holder may insist upon the presence of his attorney at such examination in the city where he resides, and will be justified in refusing to submit to do same where the adjuster of the company declines to accord such right.

5. The object and purpose of the requirement of the law of this State, providing that all foreign insurance companies doing business herein shall designate agents herein upon whom process can be served, is, that persons in this State holding insurance by such companies shall not be compelled to resort to other jurisdictions at great expense in time and money, in order to enforce their rights. Neither should such person be required to go outside this State for the purpose of arbitration, and to submit his proofs. A clause in a policy requiring such act as a condition precedent to a right of recovery would be against public policy and void, and when the contract is silent in that regard no higher right would exist by reason of a notice and demand for compliance therewith.

6. This court holds, in the case presented, that a certain registered letter from the company to assured, which he refused to receive, must be considered to have reached his hand, but that the notice contained therein was not one which he was bound to accede to.

[Opinion filed February 26, 1892.]

APPEAL from the County Court of Union County; the Hon. M. C. CRAWFORD, Judge, presiding.

On the 27th day of December, 1888, H. P. Tuthill, agent

of appellant, issued a certificate of the appellant company, insuring appellee in the sum of \$1,000 on fruits and vegetables, boxes, barrels, crates, tools and box materials contained in his warehouse building on Illinois Central right of way at Anna, Illinois. That certificate was issued subject to all conditions of open fire policy number 139,827, issued by the appellant company. Plaintiff had in his warehouse of his own property of the character insured, property of the value of \$845.25, and in addition to that property, had in store about 1,260 boxes of sweet potatoes, valued at \$757.05. On about the 14th of January, 1889, all of said property contained in said warehouse was destroyed by fire. No copy of open policy number 139,827 was ever delivered to appellee, but a certificate numbered 9,780 certified that he was insured under that open policy. At the time of his application for insurance he told the agent he had between \$800 and \$900 worth of property of his own in the building and the balance of the contents belonged to others, and that if he could make the insurance of \$1,000 to cover all the property, he would insure the contents. That day or the next, the agent brought him certificate number 9,780, and he paid the premium. A short time after the destruction of the property by fire, the appellee called upon the agent of the company and asked for his policy and the agent promised to look it up. A short time afterward the agent informed appellee that he had either mislaid or lost the policy referred to in the certificate, and on the 21st of January, 1889, appellee sent to appellant at St. Louis, Missouri, proof of loss, and gave a copy thereof to H. P. Tuthill, the agent at Anna, Illinois.

On the 18th of January, Rorick, the general adjuster of the company, met appellee and asked for his books, which were shown him; he checked the matter over and took memoranda of the articles, and appellee says the adjuster at that time claimed the open policy did not cover any articles in the house except those of appellee, as the reason it was not then settled; and the adjuster says that appellee was in doubt as to his liability to parties who had goods stored with him, or it would have been then settled. On January 22, 1889, the

adjuster of the company wrote from St. Louis to appellee that it reserved all right under and waived none of the conditions of the policy. On January 28, 1889, the adjuster again wrote that he was in receipt of appellee's proof of loss of January 21st, and calling attention to and quoting from the second paragraph of open policy, that property held in trust or on commission must be insured as such, otherwise the policy would not cover it, and quoting from the thirteenth paragraph, that the insured must, on demand, exhibit his books and submit to an examination under oath, if required, and if deemed necessary, must submit to a second examination, and stating that the goods stored in the building in trust, were not covered by the policy, and demanding that appellee should produce his books and submit to an examination on February 5th, on oath, at the office of the company in St. Louis. On February 1, 1889, appellee replied to the letter of January 28th, declining to appear at St. Louis on the 5th of February. On February 2d, the adjuster again wrote that the company adhered to its demands as made in the letter of January 28th, that he produce and exhibit his books of account and submit to the examination at the time and place designated in the letter of the 28th, and that he should further submit to a second examination at Otuck hotel, in Anna, Illinois, on 7th of February.

Appellee met Rorick on the 7th of February, and together they went to Rorick's room, and a lawyer, who was a notary public, was then present. Rorick commenced questioning appellee, and it is claimed by the plaintiff that he stated that he wished to get his attorney, and claims that Rorick replied that a lawyer would not be admitted to the room; in this he is substantially sustained by Andrews, who was the notary public, who states that plaintiff declined answering until he could get his counsel, and Rorick replied that no attorney was permitted; that plaintiff said he would get his attorney and left, while Rorick claims that when he left he said he would get his attorney and be back in a short time. The fourteenth clause of the policy provides, among other things, that "in case difference shall arise touching any loss or damage after proof

thereof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators to be selected, one by the insured, one by his company, and a third, if necessary, by the two already provided for, the award of any two of whom in writing and under oath shall be binding on the insured and this company as to the amount of such loss or damage, but shall not decide the liability of this company under this policy, and such written request shall designate a time and place for holding such arbitration. No suit against this company for the recovery of any claim for loss under this policy shall be sustainable in any court of law or chancery until an award shall have been made showing the amount of loss herein provided."

On February 9th the adjuster again wrote that he rejected entirely the proof of loss as unsatisfactory. On February 20th the adjuster called attention to the provisions of Sec. 14, and says that whereas differences have arisen touching the said loss and damage, the company requests and demands submission to arbitrators and designates the office of appellant in St. Louis, Missouri, and the last day of March, 1889, at ten o'clock, as the place and time for holding the arbitration, and in that letter states that they are advised that the original open policy, 139,827, issued to Mr. Tuthill, and under and subject to which the certificate was issued to plaintiff, has been lost or mislaid and can not now be found, and that they have issued to Mr. Tuthill a duplicate thereof. On the arrival of that letter at Anna, Illinois, as a registered letter from the American Central Insurance Co., appellee declined to receive it, and some two or three weeks afterward a constable delivered him a package of letters containing this letter. A jury was waived, and a trial had by the court, and certain propositions of law were submitted and held by the court, and certain propositions which the defendant requested the court to hold were refused, to the refusal of which the defendant excepted, which refused propositions are:

"2. And the defendant further asks the court to hold that the plaintiff has failed to show by preponderance of the evidence a substantial compliance with the terms and condi-

tions of open fire policy number 139,827, on his part, and therefore he can not recover."

"4. And the defendant further asks the court to hold as a proposition of law, that under the evidence there was a dispute arose between the plaintiff and defendant as to the amount of plaintiff's loss and damage, and that defendant requested the plaintiff in writing, prior to the commencement of this suit, to submit said loss and damage to arbitration, and that plaintiff refused to join in said submission, and such refusal would bar his right of recovery."

Which two propositions the court refused to hold, to which the defendant excepted.

A verdict and judgment was entered by the court in favor of the plaintiff for \$926, to which the defendant then and there excepted, and moved for a new trial, but filed no reasons therefor, which was overruled, and the defendant excepts and brings the record to this court by appeal, and assigns as error:

"1. The court erred in hearing and considering improper testimony on the part of the appellee, and in refusing to hear and consider proper testimony on the part of the appellant.

"2. The court erred in refusing to hold as law the second and fourth propositions asked by appellant. The court erred in rendering judgment for the plaintiff and against the defendant and in overruling defendant's motion for a new trial."

Messrs. YOUNGBLOOD & BARR, for appellant.

Mr. W. C. MORELAND, for appellee.

PHILLIPS, J. By the terms of this certificate it became a part of, and is necessarily connected with, open policy number 139,827. The policy and the certificate are one contract under the terms of the policy and certificate as thus issued; there is no insurance of property belonging to others than the plaintiff, and property stored by him in the warehouse is not included in the terms of the policy. While it is apparent from the testimony of the plaintiff and the agent, Tuthill, that it was

the intention to include all the property contained in the warehouse and have the same covered by the insurance, that intention was not carried out in the execution of the certificate or by the terms of the policy.

A court of law can not reform the contract although there is sufficient evidence in this record on which a court of equity would do so. The plaintiff made proof of loss in which he specified his property destroyed and its amount, as well as property owned by others that was in his warehouse and destroyed, and the value thereof. No copy of the open policy was ever delivered to the plaintiff, and the company can not be permitted to retain that policy in the hands of its agent, and the plaintiff uninformed as to its terms. The company is estopped from claiming non-compliance with its terms as to proofs of loss, and even were that not the case at the time of the receipt of the proof of loss, it was designated in the letter of the general adjuster. After its receipt, that formal notice of loss was received, but no objection made as to form of proof of loss, and in that letter it was pointed out that the policy did not cover property stored in the warehouse belonging to others than plaintiff, and called on the plaintiff to submit to an examination on oath, and designated the place when that examination was to take place as being at the office of the company in the city of St. Louis. The third letter from the adjuster to the plaintiff informed him that the company would adhere to what was said and demanded in their second letter, and in addition thereto, demanded that he should submit to a second examination at the hotel in Anna. The defendant had no right to require the plaintiff to bring his books and go to the office of the defendant company in another State and there be subjected to an examination on oath. To admit that rule it would apply with equal force to every foreign company doing business in the State, and persons insured would be harassed and put to cost and expense in traveling to the general office of the company at points at such a distance that the benefit that he would derive from such insurance would be destroyed; and when the plaintiff was notified by the third letter that the company adhered to its demands made in the

second letter, and demanded that he should submit to a second examination, the plaintiff would not have been prejudiced had he refused to submit to that examination as a *second* examination, when no demand for a first examination had been made that it was his duty to comply with; but when he went to the hotel in Anna and insisted that his attorney should be present before he would submit to the examination, it was a reasonable condition that he had a right to require, and if that was denied him by the adjuster he would be justified in declining to submit to the examination; and there is evidence in the record to authorize the court to find that the privilege of having his attorney present was denied him. The plaintiff is entitled to no consideration or benefit by refusing to receive the letter addressed to him of date February 20th; by the terms of the policy he owed the duty of submitting to arbitration, difference that might arise between them.

By the legislation in this State it is required of all foreign insurance companies doing business in this State to designate some agent in this State upon whom process can be served. The object and purpose of that legislation is that persons in this State holding insurance by foreign companies shall not be compelled to resort to other jurisdictions and travel long distances from the place where the fire occurs, and be at expense in procuring his witnesses to travel long distances; that protection of a citizen in this State ought not to be destroyed by implication; and the same reason—that a party can not be compelled to go away from the State to be subjected to an examination—should preclude the company from requiring that one insured should go out of the State for purpose of arbitration and to submit his proofs. A clause in a policy that required such an act as a condition precedent to a right of recovery would be against public policy and void, and when the contract is silent in that regard, no higher right would exist by reason of a notice and demand for compliance therewith. The letter of February 20th must be held to be duly transmitted and received, but the notice to the appellee to submit to arbitration at the general office of the company in the city of St. Louis, in the State of Missouri, was not a notice that the insured

St. Clair Nail Co. v. Smith.

was compelled to accede to. It was not error to refuse to hold the second and fourth propositions submitted by the defendant to the court. We do not find that the court excluded evidence that should have been admitted, nor was there error for which this cause ought to be reversed by reason of the admission of evidence. The defendant excepted to the judgment of the court and entered a motion for a new trial, but assigned no specific reasons why the new trial should be allowed. Neither in the motion nor in the assignment of errors is it claimed that a judgment was entered for a greater amount than the evidence showed the plaintiff entitled to, but that he was not entitled to recover anything. Under the evidence the plaintiff was entitled to recover. The third assignment of error is not sustained and the judgment is affirmed.

Judgment affirmed.

ST. CLAIR NAIL COMPANY

V.

ALBERT SMITH.

Personal Injuries—Servant—Contractor—Duty of Employer.

1. An individual owes a duty to a person under a contract to perform a specific service for him, to have a structure used in and about the same, reasonably safe and secure, although he be not a servant regularly employed.

2. In view of the evidence in the case presented, this court holds that the relation of master and servant existed between the parties thereto; that the plaintiff was not guilty of negligence in remaining at work after notifying the defendant of defects in a certain structure, a promise to make the same safe having been given; that he did not assume the risk of so remaining, and that the judgment in his favor can not be interfered with.

[Opinion filed February 26, 1892.]

IN ERROR to the Circuit Court of St. Clair County; the Hon. GEORGE W. WALL, Judge, presiding.

Messrs. C. P. KNISPEN and TURNER & HOLDER, for plaintiff in error.

Mr. WILLIAM WINKELMAN, for defendant in error.

PHILLIPS, J. The defendant in error contracted with the plaintiff in error to unload and shear old rails, and pile them up in a proper place so they could be used, for which he was to be paid \$1.50 per car. The superintendent of the company determined the size of the iron wanted each day for different sizes of nails to be made, and placed on a slate in the nail mill the same, and the plaintiff was thus informed of the size of rails he was to cut to keep the mill going. Rails were unloaded from the cars and laid on a platform built for the purpose, and from the platform, rails were taken to be sheared. This platform had been recently built in place of one that had been used for several years. The old platform had six rails across for the support of the rails laid thereon; the new platform had three rails. The superintendent of the defendant company made the plan of the platform and the plaintiff aided in building it. When it was almost completed plaintiff proposed to cut rails to a proper length, and put on the platform three more rails to make it the same as the old one in that respect. The superintendent objected to his cutting these rails as the parts so cut off would be wasted, and plaintiff was directed to keep a lookout for rails of proper length and when he got them to lay them aside for that purpose. This request of plaintiff to cut and put on other rails is testified to by the plaintiff and two other witnesses; it is denied by the superintendent of defendant. While the plaintiff was working, removing rails from this platform, it fell because of not being strong enough to support the weight thereon, and the plaintiff was injured. A general supervision was exercised over the plaintiff and all others working about the mill by the superintendent of the company. Plaintiff sued to recover damage. A trial resulted in a verdict and judgment for plaintiff for \$2,350.

The jury found specially that the plaintiff had a contract

with the defendant to shear the rails at so much per car, and had full control of the manner he was to do the work; the end of the platform farthest from defendant gave way first; that the plaintiff knew the platform was unsafe and notified defendant that it was unsafe, and the defendant promised to make it secure; that the plaintiff did not direct the manner of construction of the platform, and could not have avoided the accident after the end of the platform fell. The defendant sues out this writ of error.

Although the evidence was conflicting there was evidence to sustain each special finding of the jury. While the defendant was working under a contract as a contractor so far as his payment was concerned, yet he was working under the general supervision of the superintendent of the company, who testified in reference to plaintiff: "He had been filling that position under the old firm for two or three years, and I don't think that nearly anything occurred that he had to be told anything, but of course he was under my supervision to see that he kept up the work." The building of the platform was done and on a plan directed by the superintendent, and at the time it was built the plaintiff was a servant working under the superintendent, paid for by the day. That platform was constructed on the 28th of April, and some rails cut on that day, when the plaintiff was directed to suspend work, and none was done until the 9th of May, when he commenced work, and shortly after, and on that day, it fell and injured him. From these facts it is clear that the erection of the platform and the control exercised in the directions given by the superintendent, show it was under the control of the company and was a structure to be used in and about their work. The evidence shows it to have been unsafe by reason of not being sufficiently strong to hold the weight placed thereon, and its weakness is shown to have been caused by failing to use sufficient rails to support that weight. That structure was to be used in and about the work of the company, and whether used by one working as a servant or as a contractor doing work, necessarily using it about the work to be performed, the company owed a duty to have such structure reasonably safe and

secure, and sufficient to support the weight to be placed thereon. The manner the plaintiff was to be paid is not the controlling question in determining his relation to the company. The fact that he was under the control of the company's superintendent, who directed when to work, and under that supervision as to the work to be done, and in doing it acted at the time for and in place of the master, and in accordance with and representing the master's will and not his own, made the relation that of master and servant under the facts appearing in this record. The servant knew of the defects in the structure, and, as found by the jury, notified the defendant of that fact, who directed when and how it was to be made secure. Before rails could be found of proper length to make it secure it fell. The plaintiff continuing in the service under the promise and direction of the master was not guilty of negligence, nor did he assume the risk consequent on the insecurity of the structure. *Missouri Furnace Co. v. Abend*, 107 Ill. 51; *Conrad v. Vulcan Iron Works*, 62 Mo. 35; *Green v. Minneapolis Railway Co.*, 31 Minn. 243; *Penn Co. v. Lynch*, 90 Ill. 335.

The instructions given for the plaintiff correctly stated the law, and the modification of defendant's instructions was proper. We find no error in the record. The judgment is affirmed.

Judgment affirmed.

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THE OHIO & MISSISSIPPI RAILWAY COMPANY

v.

GOTTFRIED NUETZEL.

Railroads — Negligence — Flowage of Crops — Solid Embankment — Limitations — Evidence — Instructions.

1. Expert testimony is inadmissible in a controversy where the relation of certain facts and their probable result can be determined without special skill or study.

2. The issue in a given case being as to whether a railroad embankment caused an obstruction to the flow of water in consequence of which certain

lands of the party bringing the action were flooded, one of his witnesses should not be asked upon cross-examination as to his opinion whether such lands would have been flooded if there had been no deposit of *debris* brought down by a certain stream, such question being irrelevant and improper cross-examination.

3. When a crop planted is not up when destroyed, the value thereof must be estimated upon the basis of rental value and cost of seed and labor; when the crop is more or less matured so that the product can be fairly determined, the value of the crop when destroyed constitutes the measure of damages.

4. In the case presented, this court holds certain questions sought to be asked touching rental value and cost of labor in raising crops, proper as a matter of cross-examination, in order to test the fairness and determine the basis on which the witness fixed the value of the crop destroyed, but that the sustaining of the objections thereto was not such error as would warrant a reversal.

5. An instruction is erroneous which sets forth that there can be no recovery where a railroad embankment, which has been treated as a permanent obstruction by the parties to a given suit, was created more than five years previous to the institution thereof, the evidence showing the same to have been increased in height during such period.

6. It is proper to refuse an instruction, the substance of which is contained in one given.

7. An instruction not based upon the evidence should be refused.

8. The right of an owner of land bounding an inland stream to confine the waters thereof to the original channel, must be exercised with reference to permitting the flow to continue, and not an absolute obstruction thereof.

9. This court holds as proper the refusal of certain instructions asked on behalf of the defendant, the same setting forth in substance, first, that if it appears that the making of a certain embankment was warranted and necessary, the same being done carefully and in a workmanlike manner, actions for injuries caused thereby must be instituted within five years, and second, that a purchaser of land so injured takes the same in its depreciated condition, and without any right of action, they ignoring the question as to whether the work was done in accordance with skillful engineering and proper construction with reference to the rights of adjacent owners.

10. A railroad company erecting a solid embankment over a watercourse, can not escape liability for injury caused by flowage of adjacent lands upon the plea that the same resulted from an extraordinary flood; a proper outlet should be provided in such cases.

11. The rule of law in this State touching regular watercourses and surface water is the same.

[Opinion filed February 26, 1892.]

APPEAL from the Circuit Court of St. Clair County; the Hon. B. R. BURROUGHS, Judge, presiding.

MESSRS. POLLARD & WERNER and RAMSEY, MAXWELL & RAMSEY, for appellant.

MESSRS. TURNER & HOLDER, for appellee.

PHILLIPS, P. J. This is an action on the case to recover for damage for crops by reason of an overflow alleged to have been caused by constructing and maintaining a solid railroad embankment across one branch of a natural watercourse, and from time to time raising and increasing in height a solid earth embankment across one branch of said watercourse. The pleas were not guilty, and the statute of limitations of five years.

The Ohio & Mississippi Railroad was built through St. Clair County about the year 1855. From east to west it passes through the village of Caseyville, and about one-half mile west thereof reaches low ground, and is built thence to East St. Louis, on an embankment of an average height of about ten feet across the American Bottoms. In the original construction of this road there was a trestle where the low lands commence, at a point west of Caseyville about one mile. This trestle was partially filled up about 1868, and a solid embankment constructed where the trestle was. In 1869 or 1870 the Vandalia road was constructed for a mile or two at this point nearly parallel with the road of appellant and about three hundred yards north of appellant's road. The Vandalia road was built on an embankment of about the same height as that on which appellant's road was built. These two embankments were about ten feet above the level of adjoining lands. Little Canteen Creek, which came down from the highlands at a point about opposite where the trestle was originally constructed in appellant's road, forked, one branch running north, over which branch the Vandalia road was constructed on a trestle, and about three-quarters of a mile from that point that branch emptied into Big Canteen Creek, and the other branch ran south through the trestle originally built in appellant's road into a lake. At the time the trestle in defendant's road was filled up, the lands on the highlands along Little Canteen

Creek were uncleared, but subsequently were placed in cultivation, and soil and *debris* of various kinds began to be deposited where that creek came onto the low lands eastwardly toward Caseyville. From year to year these deposits increased until the land between these two railroads from the bluffs eastwardly toward Caseyville was filled up to the level of the embankments of the two roads, and from time to time since 1885 the road-bed has been raised to prevent the water from flowing over the same. There has been a corresponding rise in the bed of the creek. In times of floods the water obstructed from flowing in its former channel where the trestle had originally been, floods the land on the north of the road above that trestle by the course of the stream and below where the trestle had been. In June, 1888, plaintiff's lands from this cause were flooded, and caused the damage complained of. These facts were substantially shown by plaintiff, and the defendant offered expert testimony to show whether the closing of the trestle was the cause of the accumulation of soil and *debris* to cause the filling up of the land above the trestle. This testimony was objected to by the plaintiff and the objection sustained, and this ruling of the court is assigned as error.

It is urged this is a scientific question in which expert testimony is competent to show that the deposits would have accumulated just the same had the trestle been open, and that the effect of closing the trestle was to confine the waters to the main channel and to tend to carry off rather than to precipitate the deposits, and that the accumulation of deposits was the cause of the overflow. The issue as made by the pleading in this case was as to whether the defendant had constructed and maintained an embankment across one branch of a natural watercourse so as to prevent the flow of water through the same, and in consequence of which plaintiff's lands were flooded. The offer to show that whether the trestle was filled up or not there would still have been deposits that would have raised the surface of the land, could not enlighten the jury as to whether a solid embankment across the branch of the natural watercourse obstructed the flow of water, nor was the offer to show that the accumulation of

deposits was the cause of the overflow admissible under the issue. It may be that the deposits brought from higher up on the stream not being allowed to pass through the trestle would be precipitated and gradually raise the surface of the land to cause an obstruction by the deposits. We said in *O. & Me. Ry. Co. v. Elliott*, 34 Ill. App. 592, "We fail to see how the distinction may be taken between the flooding being caused by the filling of the trestle, and the filling of the trestle causing drift to be deposited which raised the level of the land on the north of the road, thereby causing the flooding of land." If within a distance of half or three-quarters of a mile a solid embankment across a stream causes deposits to be precipitated so that where that trestle was formerly, the water is eight or ten feet above the level of where it passed under that trestle, or if deposits are precipitated which raise the surface of the land eight or ten feet along where the trestle was formerly, in either event, to seek to show the cause of precipitation of deposits does not tend to enlighten the jury as to whether the embankment obstructed the flow of water; the facts appearing in the record are that the level of the land north of the road is from eight to ten feet higher than south of the road and where that branch formerly ran. It further appears that at that point the stream has lost all semblance of banks by reason of the deposits. If it had been permitted to pass under the trestle as formerly, it would have gone under the trestle at substantially its former level, or would have carried these deposits under and beyond the trestle, or would have been pouring over a fall eight or ten feet high, and the statement of that proposition is sufficient to show that deposits thus carried by a stream and the effect thereon of the construction of a dam across the same is one not to be determined as a scientific question, but the facts to be shown and the jury to find the effect. The relation of the facts and their probable result can be determined without special skill or study; in such case expert testimony is inadmissible. It is urged that the court erred in sustaining the objection of plaintiff to the following question asked of one of appellee's witnesses on cross-examination: "Then in your opinion would not the land of plaintiff have been covered with water if there had

been no deposits there?" The issue was as to whether the embankment caused an obstruction to the flow of water, in consequence of which plaintiff's land was flooded; and the opinion of the witness as to its relative condition with reference to, with or without deposits, was not relevant or a proper cross-examination, nor was the opinion of the witness admissible on a hypothetical case, under the facts appearing on his examination in chief. It is urged that the court erred in sustaining objections to questions on cross-examination as to the rental value of the land and the cost of raising the crops up to the stage of maturity at the time at which they were destroyed. The examination in chief was to determine the damage by estimating the value of the crops destroyed. When the crop planted is not up, there is no means of estimating the value of a crop but on the basis of rental value and cost of seed and labor, and in such cases the questions on cross-examination were the only mode of determining damage. Where the crop is more or less matured so that the product can be fairly determined, the value of the crop at the time of its destruction would be the true rule. *K. & S. R. R. Co. v. Horan*, 17 Ill. App. 650; *C. & R. I. R. R. Co. v. Ward*, 16 Ill. 522. As a matter of cross-examination, however, the questions were proper to test the fairness and determine the basis on which the witness fixed the value of the crop destroyed. But the sustaining the objections to that evidence is not error for which we ought to reverse this case. It is assigned as error, the refusal of certain instructions asked by the defendant. No point is made in argument on the refusal of the first instruction, which is as follows:

"The court instructs the jury that if the obstruction complained of was of a permanent character, and that permanent injury has ensued therefrom which could not be remedied, and that such obstruction has been treated as permanent by the parties hereto, then if such obstruction was created by the defendant more than five years prior to the institution of this action, all claims for damage on account of such obstruction are barred by the statute of limitation, and your verdict must be for the defendant."

That instruction is in conflict with the rule as declared in the Wachter case, 123 Ill. 440, and under the facts in this case, showing the raising of the embankment from time to time within five years of bringing suit, the same question is presented as was presented in O. & M. Ry. Co. v. Elliott, 34 Ill. App. 589. It was not error to refuse that instruction.

The second refused instruction is:

"The court instructs the jury that if the damage sustained by the plaintiff for which recovery is herein sought, was not the direct result of the acts of the defendant complained of, as alleged in the declaration, and that such acts were not the efficient or adequate cause thereof, but that such damage resulted from a variety of other causes, though combining with such acts to produce the result complained of, but without the operation of which causes defendant's acts complained of had not been sufficient to produce such results, then no recovery can be had herein and your verdict must be for the defendant."

The principle announced in this instruction, so far as it states a correct proposition, is embraced in the second instruction given for the defendant at its request; the instruction given is:

"The court instructs the jury that if the damage to plaintiff's property complained of, resulted from the gradual deposit of sediment, earth and other materials brought down by the creek in question during a long course of years, and such deposits at the place in question were not materially increased or hastened by the acts of defendant, of which complaint is made in the declaration, and would have recurred notwithstanding such acts, then no recovery can be had herein, and your verdict must be for defendant."

If other causes combined with defendant's acts to produce the results, but without the operation of which defendant's acts had not been sufficient to cause the same, no recovery could be had; still, if defendant's acts were the cause of producing certain other results, the combined operation of which was the damage alleged, then the defendant would be liable; and the second instruction refused would have been liable to mislead the jury. It was not error to refuse that instruction.

The third refused instruction is:

“The court instructs the jury that the owner of land bounding on inland streams may repair and restore the banks and construct a levee on his land, so long as his operation tends only to confine the waters within their original channel, and by so doing they are not responsible for any damage which may ensue to neighboring proprietors thereby.”

There was before the jury no question of protection or restoration of the banks of an inland stream; and the right to confine waters to their original channel must be exercised with reference to permitting the flow to continue, and not an absolute obstruction of that flow. It was not error to refuse that instruction.

The fourth refused instruction:

“The court instructs the jury that if it appears from the evidence that the damage sustained by the plaintiff was not the direct result of the act of defendant complained of as alleged in the declaration, then no recovery can be had herein and your verdict must be for the defendant.”

While the instruction states a correct proposition, yet the first instruction given for defendant at his request was:

“The court instructs the jury that no recovery can be had herein unless the acts of the defendant complained of constitute the proximate cause of the injury complained of, and you are further instructed that the proximate cause of an injury is that but for which the injury would not have occurred; and the burden is upon the plaintiff to prove by a preponderance of the evidence the material allegations of his declaration.”

All that was embraced in the fourth refused instruction is stated in the first instruction given. It was not error to refuse that instruction.

The fifth and sixth refused instructions are:

“The court instructs the jury that if it appears from the evidence that the filling up of the trestle was warranted and necessary for the safe construction of defendant's railway and was done carefully and in a workmanlike manner, then for any injuries coming therefrom to adjoining proprietors a right of action for damages sustained accrued at the time such filling up took place, and an action therefor could be instituted at any time during five years next thereafter.”

"The court instructs the jury that if it appears from the evidence that the filling up of the trestle in question was a rightful and necessary act for the maintenance of defendant's railroad then the damage to plaintiff's land was immediate and complete at such time, and if he acquired such land thereafter he took it as he found it in its depreciated condition, and he has no right of action against the defendant on account of such filling."

These instructions ignore the question as to whether the filling of the trestle was in accordance with skillful engineering and a proper construction of the road, having reference to the rights of adjacent owners, and are, like the first refused instruction, in conflict with what is said in the Wachter case and the Elliott case, *supra*. It was not error to refuse the fifth and sixth instructions.

The seventh refused instruction is:

"The court further instructs the jury that if they find from the evidence that the damage to plaintiff's crop was caused by an extraordinary flood, then defendant is not liable."

In the case of the O. & M. Ry. Co. v. Ramey, 39 Ill. App. 409, where the same obstruction and the same flood was involved as here, we said:

"It might be conceded an extraordinary rainfall of June 16, 1888, directly damaged plaintiff by overflowing and destroying his crops. And yet, but for the negligence of appellant in maintaining a solid embankment unprovided with suitable and proper outlets or culverts for the passage of the water in its natural course when heavy rain occurred, the water of June 16th might have flowed off and not backed up and overflowed plaintiff's crops." The P. Ft. W. & C. Ry. Co. v. Gillehand, 56 Pa. St. 445; Town of China v. Southwick, 12 Me. 238; Gray v. Harris, 107 Mass. 492. It was not error to refuse the seventh instruction.

The eighth refused instruction is as follows:

"The court further instructs the jury that if they believe from the evidence in the case that the overflow which caused the damage to plaintiff's crops was caused by the

deposits of sediment between defendant's and the Vandalia railroad, and that said deposits were caused by the road-beds of said railroad running along as the evidence shows them to run, and that said deposits would have been made as they now are, or to such an extent as to have caused the water to flow over plaintiff's land and damage his crops as testified to, if the trestle mentioned by the witnesses in the defendant's road had been left open, then they should find for the defendant."

The instruction was properly refused, as the third instruction given for defendant is another form of stating the same proposition.

The third instruction given for defendant is as follows:

"The court further instructs the jury that if they believe from the evidence that at the time of filling of the trestle in defendant's road there was no sediment coming down from the bluffs, and that after filling said trestle, in consequence of cultivating the land on the bluffs and the opening of mines above the land in question, sediment began to come down the Little Canteen Creek and settle between the road-beds of the defendant and the Vandalia roads, and that said deposits or sediment would have formed in the same manner if the said trestle had been left open, then they should find for the defendant."

The ninth refused instruction is as follows:

"The court further instructs the jury that the plaintiff in this case sues to recover damages for the obstruction of a natural watercourse; that a natural watercourse is a stream having a channel with defined banks, and that a depression in the surface of the ground where water runs only in high water, or ordinary high water, over the surface merely, without breaking the soil, is not a natural watercourse within the meaning of the law; and if the jury believe from the evidence in this case that from the main channel or north branch of Little Canteen Creek, as mentioned in the evidence, down to and below the old trestle in the defendant's road as testified to, the water flowed only occasionally and then only on the surface of the ground along a depression without any defined channel with defined banks, they should find a verdict for the defendant."

By reference to the declaration it will be seen that the allegations are that the appellant had constructed and unlawfully maintained, and from time to time had raised and increased in height to the height of fifteen feet, a solid earth embankment along the bottom lands, and across one branch of a natural watercourse; that the said embankment then and there obstructed the natural flow of said water, and forced same back upon adjoining lands; that plaintiff was in possession of, and cultivated land near said watercourse, and had crops upon same; that a heavy storm set in and a large quantity of water naturally fell upon the lands adjoining said watercourse; that said water naturally was drained and ran into said watercourse and would have escaped and run off without damage to the plaintiff but for said embankment; that said embankment stopped and prevented the water from passing off as it otherwise naturally would. The entire evidence in the record shows this obstruction to have been of a branch of a watercourse that had formerly a course through which water ran in time of freshets, so certain, that it was a substantial part of the watercourse. The effect of the obstruction caused its banks to be destroyed by the accumulation of deposits; and whether it was water in a well defined course or surface water which accumulated and ran in a certain course, the rule in this State is the same for one as in the other. The instruction was not correct, and it was not error to refuse it. That the facts appearing in this record are sufficient to sustain a verdict has been before this court in *O. & M. Ry. Co. v. Singletary*, 34 Ill. App. 425; *O. & M. Ry. Co. v. Elliott*, 34 Ill. App. 589; *O. & M. Ry. Co. v. Ramey*, 39 Ill. App. 409; *O. & M. Ry. Co. v. Thillman*, submitted at the August term, 1890; in which cases the judgments were affirmed. We find no reversible error in this record.

The judgment is affirmed.

Judgment affirmed.

THE OHIO & MISSISSIPPI RAILWAY COMPANY

v.

WILLIAM S. COMBS.

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Railroads—Negligence—Flowage of Crops—Solid Embankment.

1. Where there is evidence of injury by water coming from different sources by different causes and all creating damage, the jury in a given case must be left at liberty to estimate, as best they may, from the evidence, how much of the whole damage was occasioned by the water coming from a particular source from a particular cause. The same rule must be applied when the court tries the case without a jury.

2. Where an injury has been caused by an act in one county, to land situated in another county, the venue may be laid in either.

[Opinion filed February 26, 1892.]

APPEAL from the Circuit Court of St. Clair County; the Hon. B. R. BURROUGHS, Judge, presiding.

MESSRS. POLLARD & WERNER and RAMSEY, MAXWELL & RAMSEY, for appellant.

MESSRS. TURNER & HOLDER, for appellee.

PHILLIPS, P. J. The facts in this case with reference to the course of the stream and the filling of the trestle and its effect is the same as in that of the foregoing case, and we do not repeat them here. The main contention was as to whether the filling of the trestle caused an increased flow of water toward plaintiff's land, and thereby caused the overflow or aided to cause an overflow of the same. It is apparent from this evidence that several causes combined to cause this overflow, and we find in this record sufficient evidence to warrant the verdict that the filling in of the trestle tended to increase the flow of water toward plaintiff's land, and contributed to his damage. On the authority of *C. & N. W. R. Co. v. Hoag*, 90 Ill. 339, it must be held that when the jury have evidence

of injury by water coming from different sources by different causes and all creating damage, the jury must be left at liberty to estimate, as best they may, from the evidence, how much of the whole damage was occasioned by the water coming from a particular source from a particular cause. When the court tries the case without a jury, as here, the same rule must be applied. On the facts before the court there was evidence to sustain the finding although the evidence is conflicting as to whether the filling in of the trestle tended to contribute to the injury. In such case we are not warranted in setting aside a verdict. The objection that the suit can not be maintained in St. Clair County, the land alleged to be injured lying in Madison County, is not sustained, as when an injury has been caused by an act in one county to land situated in another, the venue may be laid in either. *Pilgrim v. Mellor*, 1 Ill. App. 448; *Gould's Pleading*, Chap. 3, 108; 1 *Chitty on Pleading*, 269. And the obstruction complained of in this case is in St. Clair County.

The judgment is affirmed.

Judgment affirmed.

WILLIAM ELLISON AND JOSEPH ELLISON
V.

SALEM COAL & MINING COMPANY ET AL.

Fixtures—Mortgages—Liens.

1. Articles personal in their nature retain the character of personalty by agreement of parties, although the same are attached to the realty in such a manner that without such agreement they would lose that character, provided they are so attached that they may be removed without material injury to the article itself or the freehold.

2. Where chattels are sold to the owner of the soil on an agreement that their character as personal property is not to be changed, and a chattel mortgage is taken thereon to secure the purchase money, a prior mortgagee of the land can not claim them, although subsequently annexed to the freehold.

3. In proceedings to foreclose a chattel mortgage on heavy machinery, a subsequent purchaser of the same and the land upon which it is located, with

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notice of the mortgage, takes the premises subject to the chattel mortgage, and a subsequent mortgagee would stand in no better light than a subsequent purchaser.

4. A clause in a real estate mortgage setting forth that it is given subject to a chattel mortgage is notice of such fact to the mortgagee.

5. Where, in such case, the chattel mortgage is not, in fact, executed until after the real estate mortgage, such clause will protect the mortgagee in the chattel mortgage by way of estoppel.

6. Persons named were made defendants to certain cases wherein material-men's liens were sought to be enforced upon the property of a coal company. They set up a lien by virtue of a certain contract and chattel mortgage upon machinery furnished said coal company, and filed a cross-bill to foreclose such mortgage, there being a real estate mortgage upon the property where such machinery was located; this court holds that said cross-bill was properly filed, that the property described in the chattel mortgage was not so attached to the realty as to become a part thereof, and that the lien of the mortgagees therein was not subject to either the lien of the material-men or the real estate mortgagees.

[Opinion filed February 26, 1892.]

APPEAL from the Circuit Court of Marion County; the Hon. B. R. BURROUGHS, Judge, presiding.

Mr. HENRY C. GOODNOW, for appellants.

Chancery has jurisdiction to foreclose a chattel mortgage. *McCauley v. Rogers*, 104 Ill. 578; *Gaar, Scott & Co. v. Hurd*, 92 Ill. 315; 2 Story's Equity, Sec. 1020.

Declaration of mortgagor that he will not carry out contract is reason for mortgagee to take possession under insecurity clause. *Furlong v. Cox*, 77 Ill. 293; *Roy v. Goings*, 96 Ill. 361.

Both appellants and the coal company treated the property as personalty. It is the intention of the parties that governs as to the personalty. *Sword v. Low*, 122 Ill. 487; *C. & A. R. R. Co. v. Goodwin*, 111 Ill. 273; *Dooley v. Crist*, 25 Ill. 551.

As these boilers, engine and machinery so furnished did not enter into and form part of the structure, as lumber, stone, shingles, doors, windows, etc., are incorporated into the structure, but retained their identity and did not become a necessary part of the structure, and could be moved in their entirety without material injury, they are personal property. *Sword v. Low*, 122 Ill. 487.

The title to this property never passed to the coal company. During the time appellants were placing the property in position they had possession and control of the property and when so placed in position the coal company executed the chattel mortgage, leaving the title to such property in them. In equity the execution of the contract, placing the property in position under it and the execution of the chattel mortgage was only one transaction, and this transaction could not affect third parties injuriously because the chattel mortgage was not upon record on the 14th day of June, 1887, when the contract was made, appellants being in possession and control of the property.

A man is said to be estopped when he has done some act which the policy of the law will not permit him to deny. 1 Greenleaf's Evidence, 13th Ed., 28, Section 22. If it be a recital of facts in a deed, there is implied a solemn engagement that the facts are so as they are recited. Same section.

All parties to a deed are bound by the recitals therein which operate as an estoppel. Section 23, page 29, 1 Greenleaf's Evidence, above cited; Wynkoop v. Cowing et al., 21 Ill. 570; Byrne v. Morehouse, 22 Ill. 602; George v. Bischoff, 68 Ill. 236; Lucas v. Beebe, 88 Ill. 427.

Where a party accepts a deed to land containing a recital that the same is subject to an incumbrance he will be bound by the recitals in the same and estopped from disputing the validity of the incumbrance. Ill. Ins. Co. v. Littlefield, 67 Ill. 368.

A party claiming under a deed can not be permitted to deny any fact admitted to exist therein. Pinckard v. Milmine, 76 Ill. 453; International Bank v. Bowen, 80 Ill. 541.

As the Salem Coal & Mining Company is estopped from denying that the material furnished by appellants is personal property, so are the real estate mortgagees. Ballou v. Jones, 37 Ill. 95.

In the absence of fraud, parties to written contract will be estopped from averring anything against the deliberate recitals and admissions contained in the same, especially when it will prejudice and work injury to others who have acted in

good faith upon the belief of the facts as stated in such contract. *Wynkoop v. Cowing*, 21 Ill. 584.

Where mortgagees take land subject to the payment of another debt the land becomes the primary fund out of which such debt is to be paid. *Lilly v. Palmer*, 51 Ill. 331; *Fowler v. Fay*, 62 Ill. 375.

Where parties take a deed for land which expressly states it is made subject to an incumbrance therein described, the law will presume that the incumbrance as it appears on its face, formed a part of the consideration for the deed. *Essley v. Sloan*, 116 Ill. 391.

Chancery may order mortgaged real and personal property sold together. *Wood v. Whelen*, 93 Ill. 153.

Mr. T. E. MERRITT, for appellees.

The chattel mortgage is statutory and must conform strictly to the provisions of the law. 2 Starr & C. Ill. Stats., 1632, Chap. 95, Secs. 1, 2, 3; *Porter v. Dement*, 35 Ill. 478.

Nor will actual notice of the mortgage in the event of its not being properly recorded avail to protect the mortgagee. The statute in regard to chattel mortgages is in derogation of the common law and should be strictly construed. *Sage v. Browning*, 51 Ill. 217.

A chattel mortgage not acknowledged is void as against a junior mortgage, notwithstanding he took with actual notice of the elder mortgage, and the rule in regard to the effects of actual notice of an unrecorded deed of realty has no application to the case of a chattel mortgage not legally executed and acknowledged. *Forest v. Tinkham*, 29 Ill. 141; *Frank v. Miner*, 50 Ill. 444.

In appellants' case no mortgage was in existence at the time and not until long afterward. *Sword v. Low*, 122 Ill. 487.

"Such articles as portable mills, engines and boilers more or less firmly affixed to the realty, will, in the absence of circumstances showing a contrary intention, be presumed to have been attached as permanent accessions to the soil. The tests are: First, actual annexation to the realty; second, application to use in connection with the realty; and third, the intention of the parties making the annexation to make a perma-

ment accession to the freehold." *Arnold v. Crowder*, 81 Ill. 56.

"Fixtures designed for permanent use and of benefit to the land are presumed to be real estate and pass under the mortgage afterward made, as platform scales let into the ground of a farm." *Wood v. Whelen*, 93 Ill. 153.

"Fixtures put on by the mortgagor after execution of the mortgage become part of the realty and subject to the mortgage." *Porter v. Cromwell*, 40 N. Y. 287.

"A portable grist mill fastened to the floor of a building for use there, is held as realty." *Long v. Cockern*, 128 Ill. 29.

"A chattel mortgage not acknowledged as required by the statute is void as to creditors and purchasers notwithstanding actual notice." *Jenny v. Jackson*, 6 Ill. App. 32.

"An engine and machinery, but so fixed that they can not be removed without tearing down the walls of the building where they are placed, are fixtures, and pass as part of the realty. The mere description of them as personal property does not make them so."

PHILLIPS, J. A petition for a lien for material was filed against the Salem Coal & Mining Company and others as defendants, and appellants being defendants to that petition, filed their cross-bill to foreclose a chattel mortgage made by the Salem Coal & Mining Company, and the petitioners for lien, with the Salem Coal & Mining Company and certain of its mortgagees, were made defendants. Certain defendants to the cross-bill of appellants answer, denying equitable right to foreclose the chattel mortgage by decree, and claiming the real estate mortgage is superior to the chattel mortgage. A decree was entered on the petition and the lien and amount found, and finding the property, consisting of a boiler, engine and other machinery in the chattel mortgage mentioned, was attached to the realty so as to become a part thereof, and finding the liens in the order of seniority to be, first, the lien for material, second, a real estate mortgage, and third, the lien of the chattel mortgage. The questions presented by the

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assignment of errors arise on the finding of the court that the property in the chattel mortgage was so attached that it became part of the realty, and in finding the lien of appellants to be subject to the lien of the real estate mortgage, and the material-man. The appellants entered into a contract in writing with the Salem Coal & Mining Company on the 14th day of June, A. D. 1887, by which they were to furnish and set up the engines, boilers, and other machinery in the mortgage mentioned, and the company was to pay a certain sum in cash when the work was completed and execute notes for the residue, which notes by the terms of the contract were to be secured by a chattel mortgage on the machinery purchased.

On the same day that the contract in writing was entered into, the Salem Coal & Mining Company executed a mortgage on certain real estate to certain parties, which mortgage included the land on which the machinery, engine and boiler was subsequently placed. That mortgage contains this clause : " This mortgage is given subject to a chattel mortgage given by the company to William Ellison & Son, on engine and machinery purchased from him." After the machinery was furnished and placed in position according to the contract, the company paid the cash payment and executed their notes, and on the 28th of November, 1887, executed their chattel mortgage to secure the note which was duly acknowledged and recorded. The evidence shows the manner the property is attached to the land, and is conflicting as to whether it could be removed without injury to the buildings in which it is, and whether a part of the realty. On the same day the real estate mortgage was executed, the written agreement by which the machinery was to be furnished was entered into. By the terms of that agreement, personal property of the appellants was to be furnished and set up and a chattel mortgage to be executed thereon. At the time of the execution of the real estate mortgage, the machinery to be furnished under the contract was personal property, and it clearly appears to have been the intention of the appellants and the Salem Coal & Mining Company that it should retain its character of personal property after it was set up ready for use, as by the contract it was

treated as personal property, and a chattel mortgage to be executed thereon. The intention of the parties that it should retain its character of personal property must influence in case of doubt. *Kelly v. Austin*, 46 Ill. 156; *Dooley v. Crist*, 25 Ill. 551; *Smith v. Moore*, 26 Ill. 392; *Arnold v. Crowder*, 81 Ill. 56; *Thielman v. Carr*, 75 Ill. 385.

In the case of *Sword v. Law*, 122 Ill. 487, it is said: "There seems to be great unanimity in the authorities that things personal in their nature may retain their character of personalty by the express agreement of the parties although attached to the realty in such manner as that, without such agreement, they would lose that character, provided they are so attached that they may be removed without material injury to the article itself or to the freehold. It is not held that parties may, by contract, make personal property real or personal at will, but that where an article personal in its nature is so attached to the realty that it can be removed without material injury to it, or to the realty, the intention with which it is attached will govern; and if there is an express agreement that it shall remain personal property, or if from the circumstances attending, it is evident or may be presumed that such was the intention of the parties, it will be held to have retained its personal character." It has been held that where chattels are sold to the owner of the soil on an agreement that their character as personal property is not to be changed, and a chattel mortgage is taken, thereon to secure the purchase money, a prior mortgagee of the land can not claim them, although subsequently annexed to the freehold. *Tift v. Horton*, 53 N. Y. 277; *Voorhis v. McGinnus*, 48 N. Y. 278. So, also, in a proceeding to foreclose a chattel mortgage on a steam mill, it was held that subsequent purchasers of the mill and land with notice of the mortgage, took the premises subject to that chattel mortgage. *Grether v. Alexander*, 15 Ia. 470. A subsequent mortgagee would stand in no better position than a subsequent purchaser.

The written agreement and the chattel mortgage shows the intention of the parties in this case. Some of the officers of the coal company who executed the mortgage and written

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agreement in behalf of the company are also mortgagees. In the real estate mortgage it is expressly provided that it is subject to a chattel mortgage given by the company to William Ellison & Son on the engine and machinery purchased from him. That provision in the deed is notice to the mortgagee. It is urged, however, that as the chattel mortgage was not then executed, that that provision of the real estate mortgage was not true. It is, however, notice that will protect Ellison & Son by way of estoppel. Ill. Ins. Co. v. Littlefield, 67 Ill. 369; Pinckard v. Milmine, 76 Ill. 453.

But it is not necessary for appellants to invoke that provision by way of estoppel, as we hold that the prior mortgagee can not claim this property as realty, although subsequently attached to the freehold, where purchased as personalty, and by agreement to retain that character. The appellants had a right to file their cross-bill to foreclose their mortgage by decree of court. McCauley v. Rogers, 104 Ill. 578; Gaar, Scott & Co. v. Hurd, 92 Ill. 315. The property in the chattel mortgage described was not attached so as to become a part of the realty; nor was the lien of appellants on that property subject to either the lien of the material-man or the real estate mortgagees. The court erred in so decreeing. The decree is reversed and the cause remanded.

Reversed and remanded.

ANDREW RAWSON

V.

CLARENCE C. CORBETT, GUARDIAN, ET AL.

Guardian and Ward—Final Account—Exceptions to—Dower—Assignment of—Practice.

1. As a matter of practice each item in an administrator's account rendered, is a separate claim depending alone upon its own merits, and as to each item judgments are separate, and the same principle would apply to a guardian's report.

43	127
150	468
43	127
59	125

2. Where, in a given controversy, certain exceptions to a guardian's account are overruled and the ward appeals, and an order sustaining other exceptions is excepted to by the guardian, who sues out a writ of error and brings the record to this court, assigning error therein, and the ward assigns cross-error, both proceedings may properly be incorporated in one record.

3. The failure of a guardian to attempt to loan the funds of his ward within a reasonable time from the receipt thereof, is a neglect of duty to such an extent as to make him liable for interest. In the case presented, sixty days are held to be such time.

4. A ward should not be called upon to pay attorney's fees, made necessary by the negligence of the guardian.

5. When a step-father takes his step-child into his family as a member, and services are rendered by the child and accepted, there is no liability on the part of the child for board. But in the settlement of estates and the accounting of guardians, the rule also is, that equitable rules will be applied. Therefore, it is held in the case presented, the step-father having kept his step-children in his family after their mother's decease, she having requested it, they having an estate and he being financially embarrassed, that he was entitled to compensation for their board.

6. This court holds that defendant should not be credited with one-third of the income of certain farm lands, he claiming the same by virtue of his rights of dower in the real estate of his deceased wife, the fee thereof being in his wards; as to them damages for the non-assignment of dower could only be had from the date of filing a petition for such assignment.

7. The guardian, in this case, as surviving husband, not being entitled to any portion of such income because of no demand for assignment of dower, it follows, as a necessary consequence, that he would not be liable for any part of the expenditures in keeping up the affairs of the farm improvements and the taxes thereon.

8. The fact that one member of a firm is in danger of a criminal prosecution will not justify all of its members giving a chattel mortgage upon firm property to secure his individual debt, the result being to render worthless a firm indebtedness to wards of another member thereof.

[Opinion filed February 26, 1892.]

IN ERROR to the Circuit Court of Madison County; the Hon. B. H. CANBY, Judge, presiding.

Messrs. KROME & HADLEY and DALE & BRADSHAW, for plaintiff in error.

An order to sell real estate of a decedent will not be made unless it is shown that there are existing debts against the

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estate. Until the holder establishes his demand against the estate the sale of land will not be authorized. *Dorman v. Tost*, 13 Ill. 128.

Guardians are liable only for what they can realize from the estate of their wards by a faithful discharge of duty. *Bond v. Lockwood*, 33 Ill. 212.

The amount found due in this proceeding will fix measure of damages in suit on bond. *Morley v. Metamora*, 78 Ill. 394; *Roper v. Sangamon Lodge*, 91 Ill. 578; *Cowley v. The People*, 95 Ill. 249; *Fogarty v. Ream*, 100 Ill. 378; *Stovall v. Bank*, 10 Wall. 583.

Choses in action go to the administrator. *Leamon v. McCubbin*, 82 Ill. 263.

We insist that the court committed no error in allowing Rawson credit for the Seidler note, less the amount that could have been obtained by filing it against the estate of Rawson Bros.

It was contended in the court below that Rawson never made a demand for his dower, and therefore should not receive credit for one-third of the rents collected by him, and *Strawn v. Strawn*, 50 Ill. 256, and *Bonner v. Peterson*, 44 Ill. 253, were cited as supporting this view of the case.

The law is that a demand for dower may be made in writing, or by parol, and in either case is equally effective. A demand may be proved by parol, as an act *in pais*, by admissions, or by positive and direct testimony, or may be inferred from facts and circumstances. 5 Am. & Eng. Enc. of Law, "Demand."

The rulings of our Supreme Court are in harmony with the doctrine just stated, it being held that as dower is not created, but only ascertained by assignment, it may be assigned by parol. *Lenfers v. Henke*, 73 Ill. 411.

In the *Strawn* case, while *Bonner v. Peterson* is quoted on this question of demand, it is also said that where the heirs are minors, "their guardian can at all times have dower assigned." P. 259.

In *Clark v. Burnside*, 15 Ill. 62, a guardian, on final settlement, was charged with two-thirds of the rents and profits of

real estate of his wards, rightfully occupied by the widow because of non-assignment of her dower, on the ground that it was his duty to have the dower assigned.

In *Lenfers v. Henke*, 73 Ill. 411, it is said, "the infant heir may assign dower," but the law in such cases, protects against excessive or fraudulent assignments.

Secs. 21 and 43 of the Dower Act expressly provide that infants may petition for assignment of dower, by guardian or next friend.

None of the cases above mentioned involved the question of the right of the owner of the dower interest, when also guardian of the heirs, and thus representing all interests, to retain his or her portion on settlement with the heirs. In the *Strawn* case there were several large farms, and partition had been made, and dower had been assigned in all the lands of the decedent, and the question passed upon arose on bill for an account of rents and profits, brought after the division had been made. In other words, that was a case where the property was susceptible of division, and had been divided, and where there was no trust relation between the widow and the heirs, and none of the obligations and duties growing out of that relationship were considered. In this case there was but one farm, not divisible, or at least there is no proof that it could have been divided, without "great injury thereto" or "without prejudice to the parties interested." In such cases by the express terms of the 39th section of the Dower Act, "the dower may be assigned of the rents, issues and profits thereof, to be had and received by the person entitled thereto, as tenant in common with the owners of the estate." In *Lenfers v. Henke*, already cited, it was held that where there was an agreement between the widow and heir by virtue of which each received a definite part of the rents of a mine, that this was in effect an assignment of dower out of the rents and profits. By our statute, farming land not susceptible of division without prejudice to the parties interested, is upon precisely the same footing as mining property, a tavern, or any property not in its nature divisible was at the common law. The assumption involved in the position of the other side is,

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that there can be no assignment of dower, except by metes and bounds, a position not borne out by the law. Is the court going to adopt a rule that will in all cases compel guardians having dower interests in lands of their wards to bring suit for assignment by metes and bounds, regardless of whether it will be to the advantage of the ward to do so or not? According to *Lenfers v. Henke*, if in this case Rawson and the Ground heirs had sustained no trust relations, and they had been of age, and it had been agreed that he should receive one-third, and they the remaining two-thirds of the rents, this would have been an actual assignment of dower. But they were minors, and he, as guardian, was under obligation to collect their rents, to lease their land, pay taxes and repairs, and account to them for the proceeds, and at the same time had a right to his own part. He did all this. What nonsense it is under these circumstances to say that he has no interest in the rents because he failed to perform a useless ceremony. Here the dower has been set apart and measured in a way to give the guardian his portion and the heirs theirs, both measured by an exactly correct rule, without wrong or injury to any one. Neither *Bonner v. Peterson* nor *Strawn v. Strawn* were intended to be applied to produce the consequences and absurdities opposite counsel seek to deduce from them, and to apply to this case.

An actual formal demand has not been held necessary in this class of cases. Such is the language of *Strawn v. Strawn*. In that very case no demand was made, and the widow had not sued for assignment of her dower, and yet it was held the circumstances proved were equivalent to a demand, and the widow was allowed to retain her third. Neither in the case last cited nor in *Bonner v. Peterson* is it held that the only way in which a demand can be made upon a minor is by suit, but it is held in both those cases, that the bringing of a suit is a demand. That is a proposition we do not question. The rules of law and the circumstances of those cases were simply applied so as to sustain the claim of dower in those cases, and what is said there by way of argument to sustain the conclusions there reached, should not be construed as to

defeat dower in a case like the one at bar. Such a use of the doctrine of those cases was not contemplated or intended by the court.

We may add that it has always been the practice in our County Court, and in the other County Courts of the State, so far as our experience goes, to allow rent to the owner of the dower interest in cases like the one under consideration. In *Sabin v. Tunnell heirs*, tried in our County Court, which was contested, the third was allowed to the estate of the widow, as can be seen from the files of that estate. No appeal was taken from the decision. That the law was so understood on first trial of this case, and that the raising of this question is an afterthought, is obvious from the fact that the exceptions filed in the County Court, though sweeping as to everything else, do not question Rawson's right to a third of the rents. The failure to raise this question precludes its consideration here and now, on the authority of *Curts v. Brooks*, 71 Ill. 125; *Millard v. Harris*, 119 Ill. 185. This is especially true as to *Brittania S. Ground*, who is of age.

But the object and purpose of Sec. 41 of the Dower Act is misconceived by opposite counsel, so it seems to us. At the common law, in proceedings to assign dower, the defendant could not recover damages for its detention. The remedy for damages was in equity. The statute of Merton, 20 Hen. III, Ch. 1, gave her damages for its detention, and the right to recover such damages whenever compelled to resort to her writ of dower. Am. & Eng. Enc. of Law, Tit. "Dower."

The 41st section of our Dower Act is simply the adoption of the statute of Merton. But independently of the statute of Merton, courts of equity, ever since they have exercised jurisdiction in dower cases, have uniformly given an account for arrears of rents and profits. This question is ably and exhaustively considered in *Keith v. Trapier*, 1 Bailey Eq. Rep. p. 68, from which we quote:

"Courts of equity give an account of rents and profits in dower, when no damages could be recovered at law under the statute. In the case of *Dorner v. Fortescue*, 3 Atk. 130, Lord Hardwicke observes that the court will give the doweress

profits from the time, not of her demanding it, which is the time from which she is to have it in her writ of dower, but will give it to her from the time her title accrued; and this although the statute gives her damages only from the time of her demand. Lord Coke says (Hardwicke quoting Coke) if the wife have not requested her dower, she shall lose (at law) the mean value, and her damages, but the course of this court (equity) has been to assign dower and universally to give an account from the death of her husband."

Curtis v. Curtis, 2 Bro. C. C. 632, Banks v. Sutton, 2 P. Wms. 719, and Oliver v. Richardson, 9 Ves. 222, are all to the same effect, and are cited and reviewed in Keith v. Trapier, in which the following language is also used:

"The decreeing an account for arrears in dower seems to rest on the same ground precisely as the decreeing an account for rents and profits of real estate. The practice of the court to give an account of rents and profits does not depend on any statute, but on general principles of equity. Lord Hardwicke puts them both on the same footing in Dorner v. Fortescue."

Our statute being just the same in effect as the statute of Merton, it can not be doubted that our Supreme Court will follow Lord Hardwicke and Chancellor Kent and the Maryland Supreme Court in their construction of it, when a case calling for the application of the doctrines of equity comes before it. The following cases follow the doctrine of Keith v. Trapier, viz.: Slatter v. Meek, 35 Ala. 528; Darnall v. Hill, 12 Gill & J. 388; Johnson v. Thomas, 2 Paige Ch. 383; Hazen v. Thurber, 4 Johns. Ch. 603; Herbert v. Wren, 7 Cranch, 370.

Messrs. HAPPY & TRAVOIS and E. C. & W. F. SPRINGER, for defendants in error.

It has been held that a step-father, who is also guardian, is not entitled to compensation for maintaining the wards who are his step-children. Douglas' Appeal, 82 Penn. St. 169.

It has also been held that where a man marries a widow with children, if he assume the relation of father to the children, and as such provides them with board and clothing, and in return has their labor, he can not recover for their support

thus furnished. *Meyer v. Temme*, 72 Ill. 574; *Brush v. Blanchard*, 18 Ill. 46; *Davis v. Harkness*, 1 Gilm. 173.

We contended on the trial in the court below, and the court so held, that Andrew Rawson was not entitled to any part of the rents of the lands owned by the mother of his wards, having made no demand for the assignment of his dower; that until such demand the heirs could not be put in default so as to entitle Rawson to one-third of the rents by way of damages.

Supporting this position, see Sec. 41, Chap. 41, Ill. Stats.; *Atkin v. Merrell*, 39 Ill. 62; *Bonner v. Peterson*, 44 Ill. 253; *Peyton v. Jeffries*, 50 Ill. 143; *Strawn v. Strawn*, 50 Ill. 256; *T. P. & W. Ry. Co. v. Curtenius*, 65 Ill. 120; *Simpson v. Ham*, 78 Ill. 203; *Cox v. Garst*, 105 Ill. 342; *Lennehan v. O'Keefe*, 107 Ill. 620; *Cool v. Jackman*, 13 Ill. App. 560.

These decisions were rendered in accordance with the statutes above referred to, which Rawson's attorneys say is like, and in fact, a substantial re-enactment of the statute of Merton.

The last named statute, according to Washburn on Real Property, gave the widow the right in an action against the heir for assignment of her dower, where she obtained judgment for her dower, to recover her damages for the heir's failure to assign, and in that statute these damages were expressly declared to be "the value of the whole dower from the time of the death of the husband unto the day that the said widow by judgment of our court have recovered seizin of her dower," etc. 1 Washburn on Real Property, 231.

The only similarity between that statute and ours is that in both, damages are allowed for failure to assign dower.

The English statute limited the persons against whom the damages could be recovered to the heir, but fixed the measure of damages to the full value of the whole dower from the husband's death; while our statute limits the damages to no class, but fixes the measure thereof from the time of demand and refusal to assign dower.

Notwithstanding this statute of ours and the numerous discussions thereon, if we correctly interpret the argument of opposing counsel, they claim:

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First, that in this case no demand and refusal was necessary.

Second, that if a demand and refusal were necessary, they made a sufficient demand and got a sufficient refusal.

Third, that dower was, as a matter of fact, somehow assigned, either by the infant heirs or by their guardian for them.

Fourth, that without any demand or refusal, and without any assignment of dower, the Probate Court has the right to give Rawson one-third of the rents accrued on the wards' lands on final settlement of the guardian's accounts after his guardianship has ended.

In the case of *Bonner v. Peterson*, above cited, the court decide that before a minor heir could be put in default so as to entitle the doweress to one-third of the rents, there must be a legal demand upon him, and inasmuch as neither the guardian nor the minor heir could make a legal assignment of dower, the demand necessary in such case would be the commencement of a suit in court for assignment of dower. The court further hold in that case that the suit commenced must result in the establishment of the right to dower; that the beginning of a suit which results in being dismissed is not such a demand as the law contemplates. We can see nothing in the relationship of the parties in this case which exempts the step-father from the effect of that statute.

It has been repeatedly held to apply as between mother and children. The fact that Rawson's interest as surviving husband might conflict with the rights and interest of his minor wards made it more necessary that a court should pass on the matter and say whether the premises were susceptible of division without prejudice, and if so, what part of the land should be set off for dower. It was certainly never contemplated by the legislature that a guardian of minor children should have the right to make a bargain with himself in his capacity of dower claimant.

Equity would not permit one holding the fiduciary relation Rawson did to act in behalf of his wards in a matter where his own interests might conflict with theirs. According to the *Bonner v. Peterson* case a guardian having no conflicting inter-

est in the matter and having some one to negotiate with beside his other *ego* can not make a valid assignment of dower.

We are referred to the case of *Lenfers v. Henke*, 73 Ill. 411, in support of the doctrine that an infant heir may assign dower.

That case is not an authority to that extent as applied to this State. It is said by the court that "at common law the infant heir may assign dower for the reason the widow's claim is urgent and necessary for her immediate support." But the question of minority does not seem to have been involved in that case. The court sustained the assignment of dower for the reason that "if of lawful age the assignment once fairly made would bind the heir," etc. That case sustained the *Bonner* case to the effect that in this State neither guardian nor infant heir can assign dower.

PHILLIPS, J. Plaintiff in error married the widow of R. B. Ground, deceased, who had, by her former husband, three children—Brittie, William and Richie Ground, and after the death of his wife, which occurred August 25, 1879, the plaintiff in error became guardian of her children and entered into bond August 19, 1881. The plaintiff in error was married to Mrs. Ground on October 3, 1877, and on the 8th of February, 1878, she mortgaged eighty acres of her real estate to secure the payment of a note for \$2,000 for money borrowed by Rawson Bros., a firm composed of her husband and his brother, but was not a party to the note. This note was made payable three years after date, and bore interest at the rate of eight per cent per annum, and is the note and mortgage known in the evidence as the *Seidler* mortgage. On September 28, 1878, Mrs. Rawson purchased what is known as the *Carney* property in Troy for the consideration of \$2,500, and as part of that consideration assumed the payment of a mortgage previously given by *Carney* on the property, and which at the time of her purchase amounted to \$2,000. The consideration in the deed was \$4,000, but the real purchase price was \$2,500. A deed to the property was executed and delivered to her, but by reason of a mistake in the description another deed was

Rawson v. Corbett.

made after her death by which that property was conveyed by a correct description to Rawson on February 16, 1881. Mrs. Rawson, at the time of her death, besides the Carney lot, which she occupied as a homestead, owned two hundred and seventy-one acres of real estate which was productive. All her indebtedness was paid but \$216 advanced by her husband, and the \$2,000 on the homestead secured by mortgage, and the note of Rawson Bros. for \$2,000, which was secured by a mortgage on her real estate.

The firm of Rawson Bros. failed and made an assignment for the benefit of creditors on January 1, 1885; just before the assignment that firm executed a chattel mortgage on the firm property to secure an individual debt of Samuel Rawson to the amount of \$2,000 and the firm property assigned only paid a dividend of thirteen cents on the dollar; the note secured by Mrs. Rawson had been due over three years at that time. The day before the assignment, Rawson conveyed his interest in the homestead to his wards. From the time of his appointment as guardian to the time of his final report on April 5, 1888, he filed no inventory and made no report as guardian. On the filing of that final report exceptions were filed to the same and heard by the Probate Court and certain exceptions sustained and certain others overruled. Corbett, the successor as guardian to two of the wards who are yet minors, and Brittic, who is now of age, appealed from that part of the order overruling exceptions, and Rawson appealed from that part of the order sustaining exceptions. In the County Court seventeen exceptions were filed which may be abstracted as, first, that he had not charged himself with all the assets which came to his hands as guardian; second, that he had not charged himself with money received for lumber and ties sold from wards' lands; third, that he had not charged himself with interest received on money of his wards and had failed to invest \$6,000 of his wards' money for three or four years; fourth, that he failed to account for all money realized on notes secured by mortgage on real estate in Macoupin County; fifth, that he failed to charge himself with one-third of cost of monument for Mrs. Rawson which was paid for out

of his wards' money, and he had promised to pay one-third of cost; sixth, that he failed to charge himself with \$4,000 loaned on January 1, 1885; seventh, that he failed to charge himself with \$2,000 received about 1884, but paid out the same on his own indebtedness for which the estate of his wards were sureties; eighth, that he failed to manage the estate frugally and did not file inventories, nor make annual reports for a period of over eight years, and during that time occupied the real estate of the wards, the homestead, and charged himself with no rent; ninth, excepts to allowance of commissions; tenth, excepts to items for which credit is asked for board of ward; eleventh, excepts to item for which credit is asked in exhibit "A," expenditures on account of farm lands; twelfth, excepts to items for which credit is asked in exhibit "B" for clothing, money, etc.; thirteenth, excepts to item for which credit is asked in exhibit "C" for clothing, etc.; fourteenth, excepts to the credit asked for the payment of the notes and mortgage on the homestead; fifteenth, excepts to item for which credit is asked for an attorney's fee paid by guardian in and about the making of reports, etc.; sixteenth, is general; seventeenth, is general.

When the cause came for trial in the Circuit Court there was an amendment to the report by the guardian asking credit for the payment of the Seidler mortgage and thereupon by leave of court additional exceptions were filed which are substantially: Eighteenth, except to credit asked for the payment of the Seidler mortgage; nineteenth, that the guardian has failed to charge himself with rents received other than the homestead and failed to charge himself with interest. The accounts with each of the three wards are incorporated in this record, and in discussing the facts of the case we will do so without applying them to each account separately except when it is necessary so to do.

The Circuit Court sustained exceptions numbered one, two, three, five, six, eight, fifteen and nineteen, and overruled exceptions numbered four, seven, nine, ten, eleven, twelve, thirteen, fourteen and eighteen, and charged the guardian in favor of Brittania with \$517.06, William T. \$812.48, and Richie \$1,944.25.

The order overruling the exceptions was excepted to by defendants in error, who filed their appeal bond on June 4, 1889, and the order sustaining exceptions was excepted to by plaintiff in error, who sues out this writ of error, and brings the record to this court and assigns error therein, and the defendants in error assign cross-error. But one record is before the court.

As a matter of practice, each item in an administrator's account rendered, is a separate claim depending on its own merits, and as to each item the judgments are separate. *Morgan v. Morgan*, 83 Ill. 196. The same principle would apply to a guardian's report.

It was held in *Harris v. Millard*, 17 Ill. App. 512, that an appellee would have no right to assign cross-errors except on the subject-matter properly before the court for review, and holding that on trials of appeals from the Circuit Court to this court the same principle applies as in appeals from the County to the Circuit Court. In that case, where the executor appealed from an order sustaining an exception, the right to assign cross-error in overruling an exception was denied to appellee.

In *Harding v. Larkin*, 41 Ill. 413, it was held that one party may prosecute a writ of error, and the other appeal from the same judgment, and both progress at the same time. We see no reason why both proceedings may not be incorporated in one record, and hold they may. The report of the guardian as originally filed showed in his hands belonging to William \$504.43 and to Richie \$681.64, and that Britannia was indebted to the guardian in the sum of \$458.58. He subsequently amended the report so as to charge himself with the sum of \$13.33 for each of his wards, as money received from the sale of lumber from the land of wards. After the appeal was taken to the Circuit Court the guardian, at the instance and request of his securities, asked, for a further credit from each ward, the sum of \$693.45, being for money paid on the Seidler mortgage, and to which the eighteenth exception applies.

The evidence shows that on February 11, 1882, the guard-

ian received a check from the master in chancery of Madison County for the sum of \$4,863.69, and on March 12, 1883, he received a check from the same officer for \$1,969.32; these two sums belonged to his wards, being inherited from the estate of their grandmother, and are spoken of in the testimony as the Taylor fund. Neither check was collected by the guardian until the 1st of January, 1885, when he placed the two checks in the hands of his attorney, John G. Irwin, to loan the same. He loaned this money, or the greater part thereof, and collected interest to the amount of \$1,071.49. The father of the wards, at the time of his death, held certain notes secured by mortgage on land in Macoupin County, which notes were converted into money, and on April 30, 1880, the guardian received from that source \$1,116.39. J. G. Irwin had collected certain moneys from the investment in Macoupin County, and on December 20, 1879, paid the guardian \$205.59. The wards had an interest in real estate in Edwardsville, which was sold, and from that source the guardian received on the 4th of January, 1882, the sum of \$2,250. At the time of the death of Mrs. Rawson she held certain notes which the evidence shows were for the rent of land to thereafter accrue, the rents accruing and becoming due after her death, and by the descent of the land to the children the rents accrued to them. Rawson was administrator of his deceased wife, and as such administrator claimed to be entitled to one-third of those notes, and to his report as such administrator exceptions were filed, and on the adjudication on those exceptions, the notes were adjudged to be the exclusive property of his wards, and from that adjudication he has prosecuted no appeal, and by that adjudication it was adjudged he had possession of the notes as guardian.

The amount of those notes was \$1,760; rents were collected by the guardian in 1879, \$403.08; in 1880, \$233.49; in 1881, \$714.78; in 1882, \$1,054.44; in 1883, \$1,058.24; in 1884, \$488.19; in 1885, \$1,158.45; in 1886, \$707.69; in 1887, \$36.66. The evidence also shows that he collected in October, 1885, of Smith, a tenant on the land, the sum of \$116, for which he executed a receipt and which item is not included in any of

the items testified to by him as being shown by his books; the rent thus collected, from this evidence it may be fairly assumed, is inclusive of the amount of the notes. It is also shown the proceeds of lumber sold were received to the amount of \$40. The fact is shown that the guardian received on February 11, 1882, the sum of \$4,863.69, and on the 12th day of March, 1883, the sum of \$1,969.32, which was not invested or loaned but permitted to remain in bank until January 1, 1885. There is no evidence in the record showing any effort on the part of the guardian to loan this money, or tending to show that a loan thereof could not have been effected. The failure to attempt to loan it is a neglect of duty on the part of the guardian to such an extent as to make him liable for interest, and as sixty days from the time of its receipt would be a reasonable time to effect a loan of the same, he should be charged interest on each of those sums from sixty days after their receipt until the 1st of January, 1885, when he placed the same in the hands of Irwin; and for interest on these sums he should be charged at the rate of six per cent per annum, and should have been charged in his report with \$987.98 on that account. It appears from the testimony of the guardian that the Seidler note and mortgage were transferable to Smith, a tenant on the wards' lands, and as testified by the guardian the interest on that mortgage was deducted from the rent owing by Smith, and kept out of the rent until that mortgage was paid off by Irwin out of the funds of the wards in his hands. The amount paid by Irwin on that mortgage was \$2,106.80, and was paid some time after January term, 1885, of the Madison Circuit Court.

Those notes bore interest at eight per cent and the amount of the principal was \$2,000. All the interest but \$106.80, was deducted out of rents for a period of seven years; and rents to the amount of \$1,013.20, were never collected, but applied on that interest. The total amount of interest so paid on that note was \$1,120, and he should also account for interest on that \$2,000 from the 12th of February, 1885, to the time of the presentation of his report in January, 1888, at the rate of six per cent per annum, which would amount to the

sum of \$350. The guardian was in possession of firm property which he used to secure the debt of an individual member of the firm, and at that time the firm had procured money on the security of land that belonged to these wards, and finally when the insolvent estate of that firm paid thirteen cents on the dollar it does not appear that any charge is made to the guardian for that sum. He is claiming as allowance for board of these wards to the amount of \$2,820, and for commissions, the sum of \$789. These amounts are embraced in certain exceptions we will hereafter allude to. It appears the homestead was purchased on credit by Mrs. Rawson and the same was subject to an incumbrance which the guardian claims amounted to \$2,000; he renewed the loan at a cost of about \$40, and paid interest over \$160, and the cash payment of \$500 made by him, and he asked to be credited with the sum of \$2,702.45 on his account so incurred in paying for that homestead. There is no evidence in this record that places its value to exceed the sum of \$2,500; as surviving husband he claims a dower and homestead interest therein, and by some arrangement made with the attorney representing the present guardian and the ward who has since become of age, he is to receive for that interest the sum of \$800. No exception brings that item before us. If, however, the wards paid the full purchase price we do not see on what his dower or homestead interest could find a basis. These large sums of money claimed by him are sufficient to enable him to pay off a mortgage that was given to secure a debt of a firm of which he was a member. He could have had the partnership assets marshaled and had precedence of this indebtedness over an individual debt of another member of the firm. The fact that the chattel mortgage was given to secure that individual debt because of a fear that a criminal prosecution might be instituted against the other member of the firm, can not be heard as an excuse for not discharging a trust of this character.

We hold that the guardian is liable for the amount of principal and interest paid on the Seidler mortgage. From the death of his wife until 1887 the guardian occupied the home-

stead; he married a second time in 1881. From the death of his wife until in 1887, while he so occupied that homestead, the wards made their home with him; it is from the evidence apparent that he treated them with the utmost kindness and extreme liberality. The mother of these children had requested that he should keep them together as one family. In doing so, it was necessary to occupy the house, and while so occupying it he should not be required to pay rent. It also appears that, while claiming in his evidence for taxes and repairs on the house, it is not embraced as a charge in his account. Had he credit for taxes, repairs and labor in and about the homestead, he might well be required to pay rent, but his account contains no credit of that character. It further appears that a tombstone was erected at the grave of the mother of his wards, and he promised to pay one-third of the cost of the same. He had been the administrator of her estate and had paid out for that tombstone \$250 and advanced money, as administrator, in excess of what he received, to the amount of \$216.21, which he asks to be credited for in his account with the wards. No exception is taken to the same further than to ask that his promise be complied with to the extent of paying the amount promised on the tombstone. In sustaining the exception to the report which presented that question, there was not error, and there should be deducted from the balance due the administrator the sum of \$83.33, one-third the cost of the tombstone. We believe these items as discussed are all that go to make up the amounts which would properly be charged to the guardian, and the first, second, third and fifth were properly sustained, and so much of the eighth which charges neglect in the management of the estate, was properly sustained. The seventh and eighteenth are substantially the same, having reference to the Seidler mortgage, and it was error to overrule exceptions thereto.

The fourteenth exception was as to the note on the homestead, and was erroneously sustained. The guardian asks credit for the sum of \$300 as an attorney's fee, paid John G. Irwin in and about the duties of the guardian and the making this report. His failure to file an inventory and make annual

reports was the principal cause of the intricate and complex character in which the accounts are, and to his neglect the great labor required in attending to the matter is owing, and the wards ought not to be compelled to pay for that service. The fifteenth exception was properly sustained. It does not appear from the evidence in this record that the guardian failed to report the amount of money realized from the investment in Macoupin County, and in overruling the fourth exception there was not error. The rule is well established that when a step-father takes the step-child into his family as a member, and services are rendered by the child and accepted, there is no liability on the part of the child for board. In the settlement of estates, and the accounting of guardians, the rule is also established that equitable rules will be applied; the facts of this case are such that we have no hesitancy in holding that equitably this guardian is entitled to pay for the board of these children; he complied with the request of their mother and kept them together as one family, and during a portion of the time he was financially embarrassed, and they with an estate, that it would be manifestly unjust to require him to bear the burden of their care and support, and the amount charged is shown to be reasonable; and it was not error to overrule the tenth exception. The twelfth and thirteenth exceptions are to items furnished for clothing, money, etc., during a portion of the time the children were at school, and taking into consideration their education and position in society, the amounts furnished, while exceedingly liberal, are not improper, and these exceptions were properly overruled. Objection is made to the allowance of commissions. The evidence shows service in and about the renting of land, and the collection of rents, and that certain duties were performed; that compensation should be made, and to the extent that commissions are asked, we hold that there was not error in overruling the ninth exception.

The eleventh exception is an objection to the item in exhibit "A," showing the expenditure in and about the farm, and taxes; there is no evidence to show that any charge therein

is improper; the evidence of the guardian is, the expenditures were made as charged and were reasonable and proper; and it was not error to overrule the eleventh exception. From the amount of rents collected from the farm and reported by the guardian he asked to be credited with one-third thereof as belonging to him by virtue of his right of dower in the real estate of his deceased wife. The fee of the lands was in the wards, and as to them damages for non-assignment of dower can only be had from the date of filing a petition for assignment of dower. *Bonner v. Peterson*, 44 Ill. 253.

Until a demand is made Rawson would be entitled to no part of the rents, and occupying the position of guardian, no demand could be made on any one that could assign dower, as he could not act for himself in demanding dower of himself in the fiduciary relation that exists here. He is not entitled to one-third the rents of the farm lands. Sec. 41, Chap. 41, Ill. Stats.; *Atkins v. Merrell*, 39 Ill. 62; *Peyton v. Jeffries*, 50 Ill. 143; *Strawn v. Strawn*, 50 Ill. 256; *T. P. & W. Ry. Co. v. Curtenius*, 65 Ill. 120; *Simpson v. Ham*, 78 Ill. 203; *Cox v. Garst*, 105 Ill. 342; *Lennehan v. O'Keefe*, 107 Ill. 620; *Cool v. Jackman*, 13 Ill. App. 560. The credit asked by the guardian of one-third the rents could not be allowed. It is urged, however, that that exception could not be considered as it was not filed in the County Court. No objection appears in the record to have been made at that time, and in the assignment of errors in this court as made by plaintiff in error that question is not presented; we must consider the question as it appears in the record.

The guardian, as surviving husband, not being entitled to any part of the rents of the farm lands because of no demand for assignment of dower, it would follow as a necessary consequence that he would not be liable for any part of the expenditure in keeping up the affairs of the farm improvements and the taxes thereon, and we are disposed to include as within the nineteenth exception the credit claimed for one-third the rents and the assumption of one-third the expense included in exhibit "A," in and about the repair of the farm, and the taxes thereon, and that the taxes of 1879, as shown in the reports,

are all to be treated as one transaction, on which the statement of the account is attempted to be made, and hold that while not being entitled to credit for rents as a dower interest, he is not liable for taxes and expenses incurred on the farm, and that all three of these items are embraced in the nineteenth exception and it was not error to sustain the same. The tenth and seventeenth exceptions are general in their character and are covered by what is said of the other exceptions. The account as thus stated would show that the guardian has received and is liable to account for the sum of \$17,657.98, and had in his hands for each of his wards the sum of \$5,885.99; and that he should be charged on William's account with \$5,885.99, and should be credited with one-third balance due administrator, less one-third the cost of tombstone \$ 44 29

Commission of guardian.....	263 00
Board, lodging and washing from September 1, 1879, to September 1, 1884.....	781 00
Board, lodging and washing from September 1, 1884, to September 1, 1886.....	312 00
One-third real estate expenses as per exhibit "A"	536 65
Expenditures as per exhibit "B".....	601 56
Account of ward with Rawson Bros., as per exhibit "C".....	116 85
One-third of interest in homestead, as per agree- ment.....	266 66
One-third the amount paid on the homestead....	900 85
One-third the taxes for 1879.....	55 73
One-third amount paid Krome and Hadley.....	10 00
	<u>\$3,888 59</u>
Balance due William.....	1,997 40
In his account with Brittania he should be charged with \$5,885.99, and should be credited with one-third balance due administrator less one- third the cost of tombstone.....	
	\$ 44 29
Commission of guardian.....	263 00
Board, lodging and washing from September 1, 1889, to September 1, 1884.....	781 00
Board and clothing during vacation of 1885 and 1886.....	63 00

RAWSON v. CORBETT.

One-third the real estate expenses as per exhibit "A".....	536 65
Expenditures as per exhibit "B".....	1,783 36
Account of ward with Rawson Bros. as per exhibit "C".....	207 05
One-third of interest in homestead as per agreement.....	266 66
One-third the amount paid on the homestead.....	900 85
One-third the taxes for 1879.....	55 73
One-third amount paid Krome and Hadley.....	10 00
	<hr/>
	\$4,911 59
Balance due ward Brittania.....	974 40
In his account with Richie he should be charged with \$5,885.99, and should be credited with one-third the balance due administrator less one-third the cost of tombstone.....	44 29
Commission of guardian.....	263 00
Board, lodging and washing from September 1, 1879, to September 1, 1884.....	781 00
Board, lodging and washing from September 1, 1884, to March 2, 1887.....	402 00
One-third the real estate expenses as per exhibit "A".....	536 65
Expenditures as per exhibit "B".....	375 04
Account of ward with Rawson Bros. as per exhibit "C".....	136 15
One-third of interest in homestead as per agreement.....	266 66
One-third the amount paid on the homestead.....	900 85
One-third the taxes for 1879.....	55 73
One-third the amount paid Krome and Hadley....	10 00
	<hr/>
	\$3,771 37
Balance due ward Richie.....	\$2,114 62

It follows, therefore, that the judgment as found for each of the several wards was erroneous. The findings of the Circuit Court are in part affirmed and in part reversed, and the cause remanded for further proceedings in conformity with this opinion.

Affirmed in part and reversed in part and remanded.

UNITED STATES MUTUAL ACCIDENT ASSOCIATION

V.

MORTIMER MILLARD.

Accident Insurance—Policy—Conditions—Injury Received While Fighting.

1. The fact that a person insured in an accident insurance company engaged in a fight, though he himself was not the aggressor, brings his injury, received as the result thereof, within a condition in the policy providing that it would not cover accidental injuries resulting from, or caused directly or indirectly, wholly or in part, by fighting.

2. Where such company contracts to indemnify a person injured for loss of time when wholly disabled from attending to his ordinary business, there can be no recovery, the injury being so slight as not to seriously interfere with the prosecution thereof.

3. This court reverses the judgment for the plaintiff in the case presented, he being an attorney whose thumb was injured during an altercation, said injury interfering in only a slight degree with the practice of his profession.

[Opinion filed February 26, 1892.]

APPEAL from the City Court of East St. Louis, Illinois; the Hon. B. H. CANBY, Judge, presiding.

Messrs. W. C. & J. C. JONES, FRANKLIN A. McCONAUGHY, and W. B. SMITH, for appellant.

Mr. L. H. HITE, for appellee.

PHILLIPS, P. J. The appellee was insured in the appellant company, he being an attorney by occupation, in the sum of \$25 per week against loss of time, not exceeding twenty-six consecutive weeks, resulting from bodily injuries effected through means as aforesaid, other than such as shall result in the loss of one or both hands, feet or eyes, which shall, independently of all other causes, immediately, wholly and continuously disable him from transacting any and every kind of busi-

43	148
60	108
61	565
43	148
79	148

U. S. Mutual Accident Ass'n v. Millard.

ness pertaining to his occupation above stated. The policy further provides that "the insurance under this certificate shall not extend to or cover accidents, injuries or death resulting from, or caused directly or indirectly, wholly or in part, by fighting or wrestling, nor extend to or cover intentional injuries inflicted by the insured or any other person." The policy further provides that the payment of this insurance is conditioned upon the money being realized from assessments upon the members of the association. While this policy was in force in January, 1889, the plaintiff became engaged in an altercation with one Cockerell, and blows passed between them. Cockerell was the aggressor, and in reply to a remark of Millard's, struck him, and during or immediately following, and as a result of this altercation, the plaintiff partially fell and caught the thumb of his right hand on a chair and injured the same, and for about twenty-six weeks was unable to use that hand. During the time he was suffering with his hand he was, during office hours, at his office or in court engaged in the business of his profession. A trial was had resulting in a verdict for \$550. A motion for a new trial being overruled the defendant brings the record to this court.

Under the certificate of insurance in this case, it is stated that the insurance under that certificate shall not extend to or cover accidental injuries resulting from, or caused directly or indirectly, wholly or in part, by fighting. That the injury to plaintiff resulted directly or indirectly from the fact of the altercation between him and Cockerell is clearly shown by the evidence in this record, and this whether the injury occurred during or immediately following the struggle. The fact that the assured engaged in a fight, though he himself was not the assaulting party, is clearly within the meaning of the terms of the policy as excluding injuries so received from its operation and insurance as being caused by fighting or being intentionally inflicted by another. *Travelers Ins. Co. v. McConkey*, 127 U. S. 661; *Huntercraft v. Travelers Ins. Co.*, 37 Ky. 300.

The evidence shows that after the injury, and during the time that indemnity is claimed under this policy, the plaintiff was at his office during office hours and attending to profes-

sional business, advising clients, accepted employment as attorney, commenced suits, and he does not remember to have refused to accept employment as an attorney during that time on account of the injury, and in reply to the question as to what extent he was disabled, the plaintiff replied, "Simply to the extent of not being able to use my hand, that is all." That the injury to the hand was severe, and that the plaintiff suffered much pain is shown. Is such injury to the extent shown by this evidence within the terms of this policy? The clause of the policy is, "That indemnity is to be paid for the loss of time resulting from bodily injuries which shall, independently of all other causes, immediately, wholly and continuously disable from the transaction of any and every kind of business pertaining to his profession as an attorney at law." Construing this contract as the parties made it, an injury that did not wholly and continuously disable assured from the transaction of any kind of business pertaining to his profession, is not within the terms of the policy.

The undertaking of the defendant was not to indemnify against pain or inconvenience, but for loss of time when wholly disabled from attending to his professional business; and it can not be said that an injury to plaintiff's hand, and pain and discomfort resulting from the injury, wholly disabled him from the prosecution of the duties of his profession. His own evidence shows it did not do so, and his right to the indemnity is not shown by the evidence in this record. *Knapp v. Preferred Mutual Association*, 24 N. Y. St. Rep. 882; *Lyon v. Railway Pass. Ins. Ass'n*, 40 Iowa, 638; *Rhodes v. Railway Pass. Ins. Co.*, 5 Lansing, 77; *Loveland v. The Fidelity & Casualty Company of N. Y.*, 67 Wis. 174.

In the case last cited, it is said: "The cause was submitted to the jury on the theory that it was the object of the policy to insure the plaintiff against accident, and to pay the plaintiff what the company had agreed to pay for the accident he had received, if, by that accident, he had been disabled in any way from prosecuting the business in which he was engaged; that it was to indemnify the plaintiff for his want of capacity to prosecute the business in which he was engaged, that the

Telford v. Patton.

plaintiff was entitled to recover at the rate agreed on in the policy for such time as, by reason of such accident, he was rendered wholly unable to do his accustomed labor, that is, to do substantially all kinds of his accustomed labor to some extent."

The Supreme Court of Wisconsin held the charge improper and say: "The plaintiff's right to recover is necessarily restricted to the time he was wholly disabled and prevented from the prosecution of any and every kind of business pertaining to his occupation."

The second instruction given for the plaintiff was: "If it appears from the evidence that the plaintiff was not able to do all the substantial acts necessary to be done in the prosecution of his business on account of the injury he received, then he was wholly disabled within the meaning of the policy." The instruction is broader than the terms of the policy would authorize. While inability to write would be exceedingly inconvenient to an attorney who had been engaged in practice for years, yet it would not be a total disability from attending to certain duties of his profession, and the instruction that if the plaintiff could not do all substantial acts necessary to be done in the prosecution of his business, he was wholly disabled, is erroneous. The judgment is reversed.

Judgment reversed.

MATTHEW TELFORD
V.
LIVONIA J. PATTON.

43 151
144s 611

Gifts—Moneys Deposited in Bank in Name of Another—Certificate of Deposit—Replevin.

1. The title of the money in all general deposits passes to the bank in which it is placed.

2. Where money is deposited in a bank and its certificate of deposit is received by the depositor, it providing for payment of the same within a

time named to another, such other is entitled thereto at the expiration thereof, although the certificate remains in the hands of the depositor.

3. Acceptance of the gift by the person in whose name the certificate was made out, will be presumed, although the depositor dies with the same in his possession, it having never been delivered.

[Opinion filed February 26, 1892.]

APPEAL from the Circuit Court of Jefferson County; the Hon. C. S. CONGER, Judge, presiding.

Messrs. ALBERT WATSON and GEORGE B. LEONARD, for appellant.

Messrs. F. F. NOLEMAN and CASEY & DWIGHT, for appellee.

SAMPLE, J. This suit was brought in replevin by Livonia J. Patton against Matthew Telford, who was the administrator of Samuel Telford, deceased, and as such came into the possession of certain property claimed by the plaintiff. It appears from the evidence that on May 1, 1889, Samuel Telford deposited in the First National Bank of Springfield, Mo., the sum of \$2,600, receiving therefor a certificate of deposit in words and figures following, viz.: "First National Bank of Springfield, Mo., May 1, 1889. L. J. Patton has deposited in this bank \$2,600, payable to the order of himself, in current funds, on return of this certificate, one year after date, with six per cent interest for the time specified and no longer.

No. 2,603.

A. J. CLEMENTS, Cashier."

On the 15th day of January, 1890, Samuel Telford died intestate at Eureka Springs, Arkansas, a bachelor, aged about sixty-five years, without having communicated to any one any facts relating to the certificate, or his intention concerning it. The first that was known of its existence outside of the bank and himself, was when it was found with other papers on his person after his death.

It appears from the evidence that the plaintiff in this replevin suit has the same initials and name as the person named in said certificate of deposit; that she is a maiden lady

who has resided all her life near Walnut Hill in Marion County, Illinois, with her parents; that in 1867 the said deceased, Samuel Telford, then of that county, began paying attentions to her, which he continued for over twenty years, and as some of the witnesses say, up to his death. He had been acquainted with her from childhood, and so far as disclosed by the evidence is the only lady to whom he ever paid any particular attentions and he was the only gentleman whose attention was received by the plaintiff. The plaintiff was not permitted to testify, but the evidence of her family shows very clearly that the relation between these two persons was not merely of a platonic order.

It is true that the evidence does not disclose any particular warmth or effusiveness, but that may be readily accounted for by their ages, he being sixty-five at his death and she about forty-eight years of age. Her mother testified that they corresponded when he was absent, and her sister states that for the last three or four years of his life Samuel Telford was part of the time in Illinois and part of the time at Eureka Springs, and that they corresponded at that time every month or so, and that he sent to plaintiff his photograph; that she had read a number of letters written to her sister by Telford, the last one in December, before he died in January. He had no particular home, but after his mother's death, which occurred about twenty-five years before his own, had boarded and made his home with others than his relations. It appears from the evidence that he was a quiet and reserved man in regard to his personal affairs and attended strictly to his own business, so that at the time of his death he left an estate in notes and bank deposits of the value of about \$25,000, exclusive of the certificate of deposit, which goes to his relatives, he having died intestate. In view of his financial condition, his relations to the plaintiff, and the precarious state of his health, it is entirely reasonable to believe that the deceased intended the certificate of deposit in controversy for the plaintiff.

It is not pretended that the deposit was made for any other person. The jury were fully justified in finding for the plaintiff, if they were correctly instructed as to the law applicable to the facts in the case.

It is conceded that Samuel Telford, the deceased, retained possession of the certificate of deposit for \$2,600, which he took in the name of the plaintiff, and the question of law is raised by the following instruction given by the court: "If you believe from a preponderance of the evidence that Samuel Telford on the first day of May, 1889, deposited in the First National Bank of Springfield, Mo., the sum of \$2,600 in the name of and for the use and benefit of the plaintiff, and received from the bank a certificate of deposit, payable to the plaintiff, then such money and the certificate representing it would be the property of the plaintiff and she would be entitled to recover the possession of such certificate after demand."

The appellant contends that the deceased, Samuel Telford, having retained possession of the certificate of deposit, the gift was unexecuted and incomplete; that a delivery of the certificate to the appellee was essential to vest title or right in her to recover the certificate, or the money. It is conceded by appellee that delivery was essential as between the parties in order to execute the gift, but contends that a delivery of the money to a third party for the appellee was an execution of the gift. This is the hinging point of the law of the case. This money was placed in the bank in the name of the appellee, and the bank gave its certificate to that effect, and written promise to pay her, or on her order, the sum of \$2,600 one year after date with six per cent interest thereon, on the return of the certificate. Its promise did not run to Samuel Telford but to the appellee. The title of the money in all general deposits passes to the bank. The title of the \$2,600 *immediately before* its deposit, according to the conceded facts in this case, was in Samuel Telford, resting there only in intention to transfer it to appellee, but *at the time* of its deposit, according to the certificate, the title was in appellee, vesting by actual delivery of the money by Telford as hers in execution of that intention. Whereupon the bank received it as her money, and gave or exchanged its promise to pay her for such title so transferred to it by delivery, a certain sum of money, as evidenced by the certificate. The subsequent fact of the delivery of the certifi-

cate to Telford did not operate to retransfer the title of the money to him, or to modify or change the written promise the bank had made. The bank could not have legally paid the money called for by the certificate to Telford.

This seems to be the logical result of this transaction of Samuel Telford, and in evident accord with his intentions, which, so far as disclosed by the evidence in this record, he had manifested no desire to change. In order to get at the real life of this case, it is necessary to look back of the certificate itself, and determine what was the legal effect of what had been done before its issue, as evidenced by the facts proven.

It is evident that counsel for appellant are mistaken when they say that "appellee claims that Telford *gave her this certificate*," upon which theory they base their argument that no gift is valid without delivery. That is not her position in this suit. Her claim is that Telford gave her *the money* represented by the certificate, and executed that gift by its delivery to a third person, the bank, which gave to her in exchange therefor the certificate; that the delivery of the certificate to Telford was for her, and he, in law, so held it. The case of *Fanning v. Russell*, 94 Ill. 386, is cited by appellant's counsel as a case on "all fours" with this one. The facts in that case are materially different from those in this one in two respects. First, the interest on the note was made payable to Sampson Fanning, who held the notes. Second, the notes were the things or property which Sampson Fanning proposed to give to his daughters, and in such case a gift is not complete without delivery. While he held possession of the notes, necessarily the gift was unexecuted. The property for which the notes were given, was that of the father, the title to which he transferred as his own to the maker of the notes. The title of the property for which the notes were given never was in the daughters.

The title of the money for which the certificate in this case was given was in the appellee, placed there by the direction of Telford, and executed by the delivery of the money to the bank by him. With this view of the case it is not necessary

to review the authorities cited in support of the proposition that delivery is essential to the execution of a gift, or of that class of authorities cited where the money was deposited in banks in the *name* of the *giver*, *in trust* for another person, for that question is not involved; upon which, however, there is a contrariety of decisions. That the gift was executed and therefore *in presenti* in this case, we think is amply supported by reason and authority. The giver in this case had lost all dominion over the property given, either by himself or another. The bank was not his agent to execute the gift and therefore the death of Telford did not operate to revoke any agency. Neither was it necessary that the appellee should have accepted the gift in his lifetime by any act or word, as by law where an *act* is done, such as in this case, which is beneficial to another, assent will be presumed. *Forbes v. Jason*, 6 Ill. App. 395; *Cork v. Patrick*, 26 N. E. Rep. 658; *Gordon v. Adams*, 127 Ill. 223; *Masterson v. Cheek*, 23 Ill. 72, 76.

There are a number of well reasoned cases that sustain the judgment in this case and follow in the same line as that of *Howard v. Savings Bank*, 40 Vt. 597, wherein "A" deposited in the bank in the name of "B" \$220 and took a deposit book in which was the following entry: "1864. No. 530. B (giving name) deposited \$220." "A" retained the deposit book until her death, when it was found among her papers. "B" knew nothing of the gift and died before "A." The court held that this was a perfected gift and that the money belonged to "B's" estate. See also *Minor v. Rogers*, 40 Conn. 572, where the authorities of other States are reviewed. Also *South v. Lee*, 2 N. Y. 591, where "D" deposited money in a bank in the name of "D for C" and took a note from the bank payable to "D for C." It was held that this was a complete change of title to the money and after "C's" death "B" could recover it.

The judgment is affirmed.

Judgment affirmed.

Joyce v. E. St. L. Electric Street Ry. Co.

MAURICE JOYCE

V.

THE EAST ST. LOUIS ELECTRIC STREET RAILWAY
COMPANY ET AL.

*Injunctions—Municipal Improvements—Petition for—Bill to Restrain
Prosecution of—Real Property—Title to—Estoppel.*

1. By ownership of property, as applied to real estate, is meant title thereto, and title can not be shown by parol; neither is the mere production of a deed to a grantee, standing alone and in and of itself, evidence of title to show that the grantee is the owner of the property therein described.

2. Where a city council acts favorably upon a petition signed by property owners, such owners are estopped from claiming damages occasioned by granting such request, likewise from objecting that the petition was not sufficiently signed.

3. Where a person has influenced a city council to act favorably through so signing, and in consequence a third person has been induced to incur expense and liability through the action of the city council so brought about, such signer can not enjoin the prosecution of the work in question.

[Opinion filed February 26, 1892.]

APPEAL from the Circuit Court of St. Clair County; the
Hon. B. R. BURROUGHS, Judge, presiding.

This is a bill for injunction filed by the complainant, alleging that he is a resident of East St. Louis and the owner in fee of real estate fronting on Broadway in said city on which is a building in which he carries on business. He charges that certain defendants, acting under the name and style of The East St. Louis Electric Railway Company, are about to construct, operate and maintain an electric street railroad with double tracks upon said street in front of the premises of complainant, claiming to do so by ordinance 608 of the city of East St. Louis, and alleges that the ordinance is void, because at the time of its passage the city council had not before it, nor had there been filed a petition to the council by the owners of more than one-half of the lands fronting upon that part of

Broadway sought to be used by the railroad company, and charging that the petitions had never been filed with the city clerk, but claiming they were at the time in the hands of H. D. Sexton, one of the persons assuming to act in the name of said company.

The bill charges that when the petitions were subsequently brought to the officers of the city, additions had been made thereto, and they were materially changed after the passing of the ordinance, and as now on file show gross misrepresentations of the land owned by different signers fronting on Broadway, and that some of the petitions are for the construction and operation of a single track road, and the ordinance grants the right to construct a double track, and charges that the owners of the greater part of the land fronting on Broadway were opposed to the construction of the railroad, and the ordinance is a fraud on right guaranteed to them by the statute prohibiting the granting of a right to construct and operate an electric street railroad by a city council without the consent of a majority of such property owners, and avers that the construction of the road would be an irreparable injury to complainant and prays for an injunction. The answer admits complainant is the owner of land fronting on Broadway, but denies the other material allegations of the bill, and alleges that ordinance 608 was passed by the city council upon the petition of the owners of the greater part of the frontage on Broadway, and that the complainant, as owner of the land in the bill described, and of other land fronting on said street, signed the petition to the council for the construction of the road, and avers the East St. Louis Electric Street Railroad Company has complied with all the terms of the ordinance, and purchased material of great value and expended large sums of money in and about the building of the road, and further avers that the suit is not brought in good faith, but in the interest of a rival corporation. A replication was filed, and on hearing, a decree was entered dismissing the bill.

Messrs. G. & G. A. KOERNER, for appellant.

Mr. F. G. COCKRELL, for appellee.

PHILLIPS, P. J. On the hearing, complainant called as a witness an abstractor of title, who testified that he had made an examination to determine the distance on Broadway and Dike avenue, along which the proposed road was to pass, and testifies that from the examination of the records, as shown by his abstract books, (some of which abstracts were made in his absence,) he had determined the ownership of lots fronting on Broadway, and that the time at which the ownership was determined was about the first of May.

He makes a list of property, and the frontage on Broadway, as of about the first of May. Complainant by his counsel introduced in evidence the record of certain deeds, but the record of deeds so offered, does not make a clear and connected chain of title to show that the grantees in those deeds are the actual owners thereof. Neither does that evidence show that at the date of signing the petitions and of their presentation to the council, the ownership was in the grantees of the deeds. The evidence shows that the petitions were duly presented to the city council and the council heard objections to the passage of the ordinance, and after due consideration the ordinance was enacted. By ownership of property, as applied to real estate, is meant title thereto, and title can not be shown by parol; neither is the mere production of a deed to a grantee, standing alone and in and of itself, evidence of title to show that the grantee is the owner of the property therein described. The evidence before the court did not show that the ownership of the property was not as alleged in the petitions. The complainant was the owner of certain real estate fronting on Broadway and signed one of the petitions to the city council of East St. Louis, upon which it acted in the adoption of ordinance number 608. That fact is set up in the answer and is shown by the petitions and evidence, and where the city council acts at his request, based on the fact of his ownership of property for such action, so done in accordance with that request, he is estopped from claiming damage. The People v. Goodwin, 5 New York, 573; Kellogg v. Treasurer, 15 Ohio St. 66; City of Burlington v. Gilbert, 31 Iowa, 356.

In the case last cited it is said: "Had the petition not been

signed by the requisite number of property holders, the action of the city upon the petition might not bind those who had not signed the petition. As to them the action of the city in assessing the cost of improvement to their property might be without authority and invalid. Whether it would be so or not we do not decide. But in this case the defendant, Gilbert, with forty-eight others, signed and presented the petition to the city council, asking the improvement to be made that was made, and when the city solicitor reported that the petition was not signed by a sufficient number of property owners it was taken by the petitioners and additional signatures obtained, and again presented to the city council for action thereon. There is no claim that the defendant signed the petition with the understanding that it was to be presented and be bound thereby only after a sufficient number of property owners had signed it. On the other hand, the record shows that the petition, when signed by complainant and forty-eight others, was by them presented to the city council, and that if the petition was not sufficiently signed he knew the fact. And we are of the opinion that after having thus signed and presented the petition to the city council, thereby inducing the city to enter upon the improvement requested in the petition, the defendant is estopped from objecting that his petition was not sufficiently signed. The defendant, by his acts, consented and agreed in writing that the city should make the improvements designated in the petition and assess his property with its due proportion of the cost thereof, and he can not be allowed to repudiate that agreement on the ground that other parties should have entered into the same agreement." While they may not be bound, he is, and when he has influenced the council to act by a petition, and in consequence of this action a third person has been induced to incur expense and liability, he can not be permitted to resort to the extraordinary remedy of injunction to enjoin an act that he has been instrumental in causing. It was not error to dismiss the bill. The decree is affirmed.

Decree affirmed.

Keith v. Knoche.

THOMAS KEITH
V.
KATE KNOCHE.

Criminal Law—Trespass Vi Et Armis—Assault—Practice—Amendments—Continuance—New Trial.

1. A new trial will not be granted to enable a party to impeach a witness where there is other credible evidence that tends to sustain him.

2. It is proper to deny a motion for a continuance upon the ground of absence of a witness, it being alleged that he would testify in a certain manner if present, when it is admitted by the other side that he would so testify.

3. Where a declaration sets forth that a defendant on divers days and times between days specified, assaulted the plaintiff, any number of assaults within that period may be proved.

4. Whether or not an assault by a man upon a woman is to be looked upon as having been made with a view to carnal intercourse, is a question to be determined by the jury from the evidence adduced.

[Opinion filed February 26, 1892.]

APPEAL from the Circuit Court of St. Clair County; the Hon. B. R. BURROUGHS, Judge, presiding.

Messrs. TURNER & HOLDER, for appellant.

Mr. WILLIAM WINKELMANN, for appellee.

PHILLIPS, P. J. This is an action of trespass *vi et armis*. The declaration as originally filed alleges the assault to have occurred on the 1st day of February, 1890. The declaration was amended so as to charge the assault to have been committed on the 1st day of August and at various other dates in June, 1890. The defendant filed his motion for a continuance on the ground of the absence of certain witnesses who would testify the general reputation of the plaintiff for truth and veracity was bad. Plaintiff admitted that if the absent witnesses were present they would testify as stated in the affida-

vit, and thereupon the motion for a continuance was denied. The plaintiff was not introduced as a witness, but two witnesses were called who testified to two different assaults, one made in June and one made in August of 1889. A motion to exclude the evidence was made because of variance, and the plaintiff moved for leave to amend the declaration, which was allowed by the court, to which the defendant excepted, and the motion to exclude the evidence was denied. The statute authorizes the practice of admitting that absent witnesses would testify as stated in the affidavit, and that when such admission is made it shall not be cause for continuance. The statute authorizes and makes it the duty of the court to permit amendments to the declaration, and it was not error to permit the declaration to be amended. On the amendment being made, the defendant moved for a continuance, which was denied, and the defendant excepted. Defendant's affidavit is wholly insufficient to authorize a continuance. It states the name of no witness by whom any fact is expected to be proven. It was not error to deny the continuance after the plaintiff's evidence was before the jury. The defendant then moved the court to require the plaintiff to elect as to which particular assault she would rely on under the one count of the declaration, which motion was denied by the court.

It is said in *Saunders on Pleading and Evidence*, 53: "When the declaration stated that the defendant, on divers days and times between two specified days, assaulted the plaintiff, he may prove any number of assaults within that period, or he may prove a single trespass at any time before the action brought, and after proving several assaults within the period mentioned, he might, perhaps, be permitted to prove others committed before that time to show defendant's malice." If trespasses incapable of continuance be so charged, plaintiff may be confined at the trial to a single act. It is said in *Gould on Pleadings*, 95: "It is now held, an allegation that the defendant on a certain day and on divers other days and times between that day and the day of suing forth the writ, assaulted the plaintiff, etc., is good, since one may assault another at different times, though an assault can not be committed at different times."

County of Franklin v. Layman.

The admission of the evidence of two or more assaults at different times under the averments of this declaration, was proper. The declaration charges that the defendant attempted to forcibly have carnal connection with the plaintiff, and his intention and purpose is to be determined from the evidence in the case. The evidence in the record, therefore, was admissible under the declaration, and as but one act of attempting to push or throw the plaintiff down was testified to by one witness, and the evidence of other acts at another time which show an attempt to use a degree of familiarity that was improper and resented by the plaintiff, was testified to by another witness, under the evidence appearing in this record, it was not error to overrule the motion of defendant to require the plaintiff to elect on which assault she would rely.

A verdict was rendered for plaintiff for \$500, and the defendant moved for a new trial, which was overruled, and the defendant excepted. The defendant urged as cause for new trial, newly discovered testimony, and filed affidavits to show that the general reputation for truth and veracity of one of the two witnesses who testified for plaintiff was bad. A new trial, will not be granted to enable a party to impeach a witness where there is other credible evidence that tends to sustain the witness. *Martin v. Ehrenfels*, 24 Ill. 187; *Woodside v. Morgan*, 92 Ill. 273.

We find no error in the instruction and it was the province of the jury to determine the damages.

The judgment is affirmed.

Judgment affirmed.

43	163
145s	138

THE COUNTY OF FRANKLIN

V.

THOMAS J. LAYMAN AND WILLIAM J. ALLEN.

Attorney and Client—Conditional Contract under Which the Legality of Certain Bonds Was to be Tested.

1. Whether or not an alleged contract was entered into is, in a given case, a question of fact for the jury.

2. A thing which is within the object, spirit and meaning of a statute is as much within the same as if it were within the letter.

3. In view of Par. 23, clause 3, Chap. 34, Starr & C. Ill. Stats., a county board can take steps to defeat the collection of a tax assessed to pay an apparent, but in fact an illegal debt of the county, and procure a final adjudication declaring void and invalid certain bonds, to pay the interest upon which such tax was assessed.

4. Attorneys who have entered into a contract to institute legal proceedings to test the validity of municipal bonds (the contract providing for certain fees in case they were held to be invalid) can not be required to depart from their own view of the law as to the manner of making such test, or to appear and defend every suit that may be brought thereon against a given county, unless it is necessary to do so to avoid liability on the part of the county being enforced against it; and the fact that they were notified in a given case of the institution of a suit in a court named, and that they declined to appear and defend the same, will be no defense to their right of recovery upon said contract, if the result of the litigation as instituted and carried on by them was, that the bonds were held invalid, or that taxes could not be collected to pay the same.

5. In the absence of such contract with the county board, a contract with an individual by which the same result would ensue would create no liability against the county.

6. The right to levy a tax, and to make an assessment to pay it, for the purpose of raising money to pay the interest on such bonds, being determinable by an exception to the application of the collector for judgment against delinquent lands, the fact that that method was selected by such attorneys and prosecuted in the name of an individual tax payer was within the contract in the case presented, and such proceeding resulting in a judgment that would defeat the collection of the bonds, would warrant a recovery of the fees agreed upon.

[Opinion filed February 26, 1892.]

APPEAL from the Circuit Court of Perry County; the Hon. GEORGE W. WALL, Judge, presiding.

Mr. F. M. YOUNGBLOOD, for appellant.

Messrs. W. K. MURPHY and W. J. N. MOYERS, for appellees.

PHILLIPS, P. J. This cause was before this court at the

August term, 1889, and is reported as the County of Franklin v. Thomas J. Layman, 34 Ill. App. 606. The facts appearing in the record, at this time, and the facts as then before the court are substantially the same. The cause when before us as reported in 34 Ill. App., was reversed for error in the giving of an instruction; we then said, "It is insisted under these assignments, that the contract of November 7, 1883, above mentioned, even if proven to have been made, was *ultra vires*, and not binding upon the county, because, in the proceedings to test the validity of the \$100,000 series provided by the contract, it was not stipulated that the county should be party plaintiff or defendant, but Richeson or some other tax payer of the county; and because the contract provided for the payment of a contingent fee for professional services employed to defeat the collection of a tax charged on a State assessment. Par. 24, clause 3, Chap. 34, Starr & C. Ill. Stats., provides, each county shall have power 'to make all contracts and do all other acts in relation to the property and concerns of the county necessary to the exercise of its corporate powers.' Par. 23 provides that the county board can exercise the powers granted to the county as a body corporate or politic. In the exercise of the power 'to do all other acts in relation to the concerns of the county,' the county board could lawfully take steps to defeat the collection of a tax assessed to pay an apparent, but in fact an illegal debt of the county, and procure a final adjudication declaring void and invalid said bonds, to pay the interest upon which such tax was assessed, and thereby relieve the tax payers of the county from an unjust and an illegal burden. A contract made for this purpose was within the object and spirit of the statute, and we see no good reason to hold the mode adopted to test the validity of the bonds was forbidden by law, or was improper. A thing which is within the object, spirit and meaning of the statute, is as much within the statute as if it were within the letter." Potter's Dwarris on Stat., 179.

Holding this contract not invalid, or against public policy, we would not disturb the verdict of the jury had they been properly instructed. It appears from the evidence in this

record that on May 22, 1880, appellees, who were attorneys at law, entered into a written contract with appellant, by which they were to institute legal proceedings to test the legality and validity of certain bonds issued by appellant to the Belleville & Eldorado R. R. Co.; one series of \$100,000 issued under the act of 1861, and the other series of \$49,000 issued under the act of 1849. By the terms of the contract, if appellees were successful in having those bonds found invalid they were to be paid \$8,000 for their services, in addition to the amount of a retainer then paid of \$250. All the bonds were of the denomination of \$1,000 each.

Under the contract originally made between appellant and appellees, the appellees, at the October term of the Circuit Court of 1880, of Franklin County, on a bill for injunction against the unknown owners of all said bonds, obtained a decree by default perpetually enjoining the collection of taxes and declaring the bonds void. At a subsequent term that decree was opened on the petition of holders of certain of said bonds, and the cause was transferred to the Circuit Court of the United States for the Southern District of Illinois, where, on July 3, 1883, a decree was entered finding that thirteen of the bonds issued under the act of 1849 were issued without authority of law and were void. The owners of those thirteen bonds were before the court and as to them the injunction was made perpetual; and the bill was dismissed without prejudice as to thirty-six of the bonds issued under the act of 1849, the owners of which were not then before the court. Under that decree the owners of thirty-six of the bonds issued under the act of 1861 were before the court, and as to those owners and those bonds the bill was dismissed for want of equity, and as to that part of the decree dismissing the bill as to thirty-six of the bonds issued under the act of 1861 appellees were desirous of prosecuting an appeal or writ of error, but the county board failed to comply with their request to do so.

On the 7th of November, 1883, appellant paid appellees \$2,634.24 for their services in reference to the bonds of 1849; and on that date entered into the contract of November 7, 1883, referred to in the opinion of this court in 34 Ill. App.,

from which the above quotation is made. No taxes were assessed to pay interest on the bonds issued under the act of 1861, from 1880 until 1884, but an assessment being made in 1884 for taxes levied to pay interest on the bonds of 1861, the county collector applied for judgment against delinquent lands at the May term, 1885, of the County Court of Franklin County, and appellees filed objections in the name of Richard Richeson, a tax payer of said county, to the rendition of such judgment, which were overruled by the County Court and a judgment entered against the land for such taxes, from which judgment an appeal was prosecuted by Richeson, on the hearing of which the judgment of the County Court was reversed. The opinion of the Supreme Court, reversing the judgment of the County Court, is reported as *Richeson v. The People*, 115 Ill. 450. The effect of that opinion is that the bonds issued under the act of 1861 were declared invalid and no taxes to pay interest on principal of said bonds have been assessed, or levy made since the filing of that opinion, and the county received from the State treasurer the sum of \$9,069 theretofore collected in Franklin County to pay interest on that series. And after the receipt of that money and the facts in reference to the same, and the conclusion from the decision in the Richeson case, were entered of record by the county board of Franklin County, appellees presented their account in writing to the board in session and demanded payment of the balance of amount claimed to be due them, viz., \$5,365.76, and payment was refused. The facts as to whether the contracts of 1880 and 1883 were entered into were questions for the jury, and while the evidence is conflicting as to the contract of 1883, the evidence in the record clearly warrants the finding by the jury that such contract was entered into, and we having heretofore adjudged that such contract was valid, if made, it was not error to allow evidence of such contracts to go to the jury; nor was there error in the admission of evidence for plaintiff, nor was it error to give the first and second instructions asked by plaintiff, with reference to the contract of 1883, nor to refuse instructions one, two, three, four, five and six asked by defendant, which

are based on the theory that the contract of the 7th of November, 1883, was invalid. The appellees having undertaken to institute legal proceedings to test the validity of the bonds, they can not be required to depart from their own view of the law as to the manner of testing the validity of the bonds, and to appear and defend every suit that may be brought thereon against the county, unless it was necessary to do so to avoid liability on the part of the county being enforced against it; and the fact the appellees were notified of the institution of a suit in the United States Circuit Court and declined to appear to defend the same, would not be a defense to their right of recovery if the result of the litigation, as instituted and carried on by them, was that the bonds were held invalid, or that taxes could not be collected to pay the same.

It was not error to refuse the seventh instruction, which was on the theory that if they did so refuse they could not recover.

The right to levy a tax and to make an assessment to pay the same for the purpose of raising money to pay the interest on those bonds, could be determined by an exception to the application of the collector for judgment against delinquent lands. And the fact that that method was selected by appellees and prosecuted in the name of an individual tax payer, was clearly within the spirit of their contract, and if a proceeding so instituted resulted in a judgment that would defeat the collection of the bonds, they would have a right to recover the fee agreed upon. And while the county board would have no right to pay a fee for services rendered an individual, it not being within their power to so contract for such services alone, yet where, in the prosecution of a purpose that is to inure to the advantage of the county, and to avoid its liability on the bonds issued, and in pursuance of a contract on the part of the county, lawfully entered into, a method is adopted and counsel employed under such contract to determine and test the validity of the bonds in that manner, and such method is within the spirit of the contract, and the effect of the adjudication in the litigation thus had is to discharge the county from liability, it can not be said that such contract for the

Mathews v. Reinhardt.

payment of services so rendered is *ultra vires*. The absence of a contract with the county board of that character, and a contract with an individual by which the same result would ensue, would, however, create no liability against the county.

The verdict of the jury finding for the plaintiffs in the sum of \$5,365.76 was sustained by the evidence. We find no error in the record and the judgment is affirmed.

Judgment affirmed.

W. SCOTT MATHEWS
V.
ADOLPH L. REINHARDT.

43 109
149s 635

Insolvency—Fraudulent Sale.

1. A creditor violates no rule of law when he takes payment of his demand, though other creditors are thereby deprived of all means of obtaining satisfaction of their own equally meritorious claims.

2. Admitting that a person subsequently insolvent, in purchasing goods, fraudulently obtained credit, and that a creditor to whom a bill of sale, covering the same, was given, had knowledge of that fact, it can cut no figure unless there was a disaffirmance of the sale.

3. The purchase of goods from a person properly in possession under a bill of sale, given by an insolvent, can not be construed as aiding a fraudulent intent on the part of the insolvent, although the purchaser of the stock knew of the pecuniary condition of such insolvent. And this court holds that there is no evidence in the case presented, justifying the view that a purchaser named was a party to any fraudulent transaction.

4. While mere inadequacy of price is not *per se* ground for setting aside a transfer, it may be a circumstance to be considered in determining whether the sale was fraudulent; yet unless so gross and palpable as to amount in itself to proof of fraud, it would not authorize a sale to be set aside.

[Opinion filed February 26, 1892.]

APPEAL from the Circuit Court of Marion County; the
Hon. B. R. BURROUGHS, Judge, presiding.

Messrs. F. F. NOLEMAN, and CASEY & DWIGHT, for appellant.

Messrs. W. & E. L. STOKER, for appellee.

PHILLIPS, P. J. This was an action of replevin brought by appellee against appellant, sheriff of Marion County, to recover a stock of jewelry upon which the defendant had levied by virtue of writs of attachment issued against J. W. Poe.

It appears, from the evidence in this record, that for several years prior to the latter part of December of the year 1887, John W. Poe had been keeping a jewelry store at Centralia, Illinois. In the latter part of 1888 he became largely indebted and was insolvent, having during the latter part of 1888 purchased a large quantity of jewelry amounting to between twelve and sixteen thousand dollars. Between 1883 and 1887 Poe borrowed large sums of money at different times from John C. Fears, a brother-in-law in St. Louis, and on the night of December 28, 1888, Fears purchased his stock of goods, which was invoiced at about \$2,700, and took a bill of sale for same, and claims to have credited Poe's indebtedness to him with that amount, without removing the stock of goods from the store. Fears placed the same in charge of his agent, E. L. Stoker, and on the morning of the 29th returned to St. Louis. From some time in 1885 to 1887, plaintiff, a jeweler, had worked for Poe, and in 1888 had a shop in Centralia, and learning of the failure of Poe induced Fears' agent to go to Lebanon and endeavor to sell his stock of goods to Charles Reinhardt, father of plaintiff. Charles Reinhardt on the 1st of January, 1889, sent a competent agent to estimate and value the stock, and after that examination offered \$1,600 for it, which, on being submitted to Fears by his agent, was accepted, and the key of the store was delivered to Charles Reinhardt, who sent the same to the plaintiff, and he was placed in charge of the stock of goods. A few days thereafter the defendant, as sheriff, levied writs of attachment on the stock of goods, claiming the property to be that of John W. Poe. That Fears had advanced money to Poe from

time to time, and that Poe was indebted to him at the time of the transfer of the property is clearly shown. That indebtedness exceeds the invoiced value of the goods.

It is urged that the sale was made by Poe with intent to delay and defraud his creditors. He had a right, however, to prefer creditors, and if he elected to prefer Fears and pay him, to the exclusion of other creditors, he could do so, and Fears had a right to buy even though he knew at the time that Poe was insolvent. In *Gray v. St. John*, 35 Ill. 222, it is said: "The knowledge which Jackson had of the fraudulent intention of Finch did not prevent him from receiving pay of an honest debt. A creditor violates no rule of law when he takes payment of his demand, though other creditors are thereby deprived of all means of obtaining satisfaction of their own equally meritorious claims." This rule has been frequently announced. *Waddams v. Humphrey*, 22 Ill. 661; *Wood v. Shaw*, 29 Ill. 444; *Tomlinson v. Mathews*, 98 Ill. 178; *Payne v. Miller*, 103 Ill. 442. There is no disaffirmance of a sale here, but a suit to recover the value of the property sold, and even if it be admitted that Poe at the time of purchasing, fraudulently obtained credit, and even if Fears had knowledge of that fact, it would be of no importance unless there was a disaffirmance of the sale. *Gray v. St. John*, *supra*. But there is no evidence tending to show that Fears had such knowledge, nor is there satisfactory evidence to show that the price paid for the property, crediting Poe's indebtedness, was less than its real value. To Charles Reinhardt both Fears and Poe were personally unknown; his agents to examine the property and ascertain its value reported to him that it was not worth to exceed \$1,800 or \$2,000 and advised that not more than \$1,600 be paid therefor, and when Charles Reinhardt purchased it, his negotiation was with Stoker, the agent of Fears, and he paid the full amount he contracted to pay for the property with no knowledge of any fact in connection with Poe, except that he had been informed that he was insolvent. There was in that knowledge nothing to prevent him from buying the property, and the purchase of the property for the purpose of starting his son in business can not be construed as aiding any fraudulent intent that existed in Poe.

From a careful examination of the evidence in this record, we find no fact tending to show that Charles Reinhardt was a party to any fraudulent transaction, and unless he intended to aid in the commission of a fraud by the purchase, or acted in bad faith, the sale would be valid. *Myers v. Kinzie*, 26 Ill. 36; *Ewing v. Runkle*, 20 Ill. 449; *Gridley v. Bingham*, 51 Ill. 153; *Hatch v. Jordan*, 74 Ill. 414. When Charles Reinhardt turned the property over to the plaintiff it came to him untainted with fraud that would avoid the sale. Under the issues in the case, no question of the goods being fraudulently procured by Poe is in issue. The attaching creditors affirmed their sales by seeking to recover the price. The sheriff having writs of attachment, occupies no better position than do the plaintiffs in attachment. The question as to whether Poe procured the goods by fraudulent representations of his financial ability was not admissible in evidence against this plaintiff, and the exclusion of the report made by Poe to the commercial agency, and the exclusion of certain evidence in depositions, which pertained to the procurement of goods by fraudulent representations, was not error. Neither was it error to exclude from the jury the judgment that was rendered in the case of Nathaniel White against John W. Poe, as that judgment was rendered on an account more than one month after the replevin writ in this case was served and did not tend to determine the issues in this cause. The tenth instruction which excluded this evidence was not error. The defendant insists that the eighth instruction given for plaintiff is erroneous; that instruction is that—"The court instructs the jury for the plaintiff, that the sale and purchase of goods for a less sum than the actual value is not fraudulent, and although you may believe from the evidence that Reinhardt purchased the goods for less than their real value from Fears, that, of itself, is not evidence of fraud or circumvention on the part of Reinhardt, and if you believe Reinhardt acted in good faith you should find for the plaintiff."

While mere inadequacy of price is not, *per se*, ground for setting aside a transfer, it may be a circumstance to be considered in determining whether the sale is fraudulent; still,

Storm v. Barger.

unless so gross and palpable as to amount, in itself, to proof of fraud, it would not authorize a sale to be set aside. The entire instruction must be considered together, and makes the question of inadequacy of price apply to the transaction between Reinhardt and Fears, and if Reinhardt acted in good faith inadequacy of price between them would not be evidence of fraud that could be considered by the jury. Under the facts appearing in this record, we hold the giving of this instruction was not erroneous. We find no reversible error in the record, and the judgment is affirmed.

Judgment affirmed.

WILLIAM A. STORM

V.

PHILIP S. BARGER.

Highways—Public and Private—Obstruction of.

1. No private right exists in a given person to recover damage sustained by the public alike, through the obstruction of a public road, unless he avers damage special to himself.

2. The fact that the public has not worked a public road, does not destroy its character unless the condition thereof is such as to require it to be worked so as to enable the public to use the same.

[Opinion filed February 26, 1892.]

APPEAL from the Circuit Court of Pope County; the Hon. R. W. McCARTNEY, Judge, presiding.

Messrs. W. S. MORRIS and W. H. MOORE, for appellant.

Messrs. THOMPSON & CROW, for appellee.

PHILLIPS, J. The plaintiff filed his declaration containing three counts. The first and second counts alleged that the

plaintiff was possessed of a certain farm and had a road and cart-way out of his farm which was obstructed by the defendant, whereby the plaintiff was deprived of its use. The third count alleges that the plaintiff was possessed of a certain other messuage and farm, and had the right to the unobstructed use of a certain public and private road or highway, which was wrongfully obstructed by the defendant so that the plaintiff was deprived of its use. A demurrer was sustained to the third count, and issue joined on the first and second counts, and on trial a verdict and judgment was entered for the defendant, and the plaintiff brings the record to this court by appeal.

The first question presented is, was it error to sustain the demurrer to the third count of plaintiff's declaration, it averring the road to be a public and private road or highway, and its obstruction. No private right exists in the plaintiff to recover damage that is sustained by the public alike, unless he avers damage special to himself. The obstruction of the road deprived the public of its use. The averment of the deprivation of the plaintiff of its use is not an averment of special damage, but an averment of the same deprivation to himself as existed in the public. Under such averment and in the absence of averment of special damage, the demurrer was properly sustained.

It is assigned as error that, "The court erred in refusing to permit the witness Storm to answer the first question put to him in his re-direct examination, which question will be found on page nineteen of the record." On an examination of the record, no objection was sustained by the court to any question on the re-examination of the witness Storm, nor was there any objection sustained to any question asked by appellant's counsel on the page of the record referred to.

The second and third errors assigned are that the court erred in sustaining objections to the second and third questions asked the defendant on cross-examination. The second question asked was as to whether the defendant had tried to induce another land owner, through whose land the road passed, to fence the road, and the third question was as to whether he knew of the road being worked as a public road.

 Ramming v. Caldwell.

The evidence shows the road had been used by the public for, at least, thirty years, and its use during that time was a public use, and no evidence shows it to be a way appurtenant to the plaintiff's farm. Under the averments of the declaration, the plaintiff must recover, if at all, by reason of the obstruction of a private road. The fact that the public has not worked the road, which is a public road, does not destroy its character as a public road unless the condition of the road is such as to require it to be worked so as to enable the public to use the same. It was not error to sustain the objection to the third question. The question as to whether defendant had tried to induce other land owners to fence the road would only be relevant as showing a purpose to obstruct the road, and under the averments of the declaration, unless it appears that it was a private road, the defendant could not recover. The evidence shows the road to be a public road, and the question was not material that it was not error to sustain the objection to the second question asked the defendant on cross-examination. The other errors assigned are, that the court erred in giving the defendant's instructions, and in overruling plaintiff's motion for a new trial. From what has been said the evidence did not sustain the allegation of the plaintiff's declaration, and the instructions asked by the defendant are on the theory that if the way was a public way the plaintiff could not recover unless he showed special damage.

There is in the record no error that would allow us to reverse the judgment.

The judgment is affirmed.

Judgment affirmed.

 JOHN RAMMING

V.

S. H. CALDWELL.

43	175
92	4 88

1. There can be no implied contract between parties named touching a given matter, there being a complete, written express contract embracing the same.

2. A written contract containing no warranty, the law will imply there was none, and that a given purchase was made at the risk of the purchaser and upon his own judgment.

3. It is proper, in case of a written contract, for the court to construe the same and instruct the jury if such be the case that it contains no warranty.

4. No implication arises that a warranty exists as to an article sold as second-hand goods that it will answer the purpose for which made.

5. An express contract in writing can not exist as to one part of a contract, and an implied one of the vendor as to another part of the same contract, growing out of the same transaction, and the same in point of time.

6. The fact that a *remittitur* has been entered in a given case, in this court, for a part of the sum for which a certain judgment was rendered below, can not cure errors of law occurring on the trial going to the right of recovery.

[Opinion filed February 26, 1892.]

IN ERROR to the City Court of East St. Louis, Illinois; the Hon. B. H. CANBY, Judge, presiding.

Messrs. A. S. WILDERMAN and J. M. HAMILL, for plaintiff in error.

Messrs. MESSICK & RHOADS, for defendant in error.

PHILLIPS, P. J. The defendant in error instituted his action of assumpsit against the plaintiff in error in the City Court of East St. Louis. The declaration alleges that in consideration that the plaintiff, Caldwell, would buy of the defendant, Ramming, at his request, certain machinery and merchandise named, and have a man assist in putting the same in a building to be used as a planing mill, said machinery to be placed in said building within a reasonable time, for which the plaintiff was to pay a specified price, and that said machinery was to be in good order and suitable for the purpose for which the same was to be used. That defendant made certain promises. That defendant did not regard his promises, but furnished a boiler which was not of the dimensions promised and not suit-

Ramming v. Caldwell.

able for the purpose furnished, and which was old and eaten up with rust, and would leak, and that other machinery was not of the quality and would not perform the work promised, and plaintiff thereby lost much time and lost business and profits and was put to expense in repairs, and sustained damage. To this declaration the defendant filed the general issue, and on trial a verdict and judgment was entered for plaintiff for the sum of \$500. A motion for new trial being overruled, the defendant sues out this writ of error and brings the record to this court for review. The plaintiff paid all but a few dollars of the price of the machinery and merchandise, and on the trial the plaintiff claimed the sale, by the defendant to him, of the goods in the declaration described with a warranty of quality and that they would do the work for which they were intended, and that the boiler and other machinery would not do the work and were not in repair, and that the plaintiff lost much time, and there was loss of profits, and the mill was idle, and there was great expense in repairing the machinery, boiler, etc. The weight of this evidence shows the machinery and boiler did not do good work, and the boiler was out of repair. The evidence of plaintiff is that the boiler was to be a second-hand boiler. The defendant insists the boiler, machinery and merchandise were furnished under a written contract which was offered in evidence and is as follows:

“ST. LOUIS, July 20, 1887.

MR. S. H. CALDWELL, East St. Louis, Ill.

Dear sir: I propose to furnish you, 12-inch bore, 24-inch stroke, horizontal, slide valve engine, with the Vandergrift automatic cut-off attachment, 8½-inch diameter, 10½-foot shaft 16-foot, 6 arm flywheel, weighing 10,000 pounds; one 8-foot, or 9-foot diameter 16-inch face pulley; one 48-inch diameter, 20-foot long, 4-flue horizontal boiler with 20-inch diameter, 4-foot long steam drum, and 20-inch diameter, 6-foot long heater, containing 60-foot of 1½-inch pipe; also breeching and stock to be 24-inch diameter, 40-foot high, upper part No. 16 iron, lower part No. 14 iron; new fire front, grate bars, back stand, barring bar, etc., one fire rake, scraper and poker, safety

check and blow-off valve, steam gage, glass water gauge and gauge cocks, throttle valve close to steam drum; all steam and exhaust pipe; also, 1½-inch bleeder pipe and valve from boiler to heater water connections, not exceeding 15 feet from boiler, also extra water connections for filling boiler; one No. 2 Little Giant Injector connected with heater; exhaust pipe to an elevation of 10 feet above roof; necessary guy rods for stack; all necessary foundation bolts and plates, together with template for engine, to be delivered within four days. Also furnish the pulleys, shaftings, hangers, etc., as specified in another proposal, and have a man to assist in the erection of all the above described machinery, for the sum of \$1,185; \$15 to be deducted on condition that \$500 is paid on delivery of all machinery. Machinery to be delivered within ten days from the date of this proposal, excepting the pulleys, etc.

Respectfully,

JOHN RAMMING,
N. J. MAURER.

All necessary oil cups and wrenches will be furnished with engine."

"The above contract is accepted this 20th day of July, 1887.
S. H. CALDWELL."

The plaintiff admits the execution of this contract, but claims that he did not understand this to be a contract, but a specification of what was to be furnished.

The action being an action at law, the rules of law applicable to this class of contracts must be applied. The proposal to furnish and sell the property in the written proposition, accepted in writing as a contract, made the contract between the parties and included the whole subject-matter of the contract, and all previous or contemporaneous negotiations were merged in that written contract. It constitutes a contract complete in itself and without ambiguity. It is therefore a contract in writing and contains no warranty as to quality or to the manner in which the work will be done. The contract being a complete, written, express contract, there can be no implied contract between the parties pertaining to this same subject-matter. *De Witt v. Berry*, 134 U. S. 306; *Ruff v.*

Ramming v. Caldwell.

Jarrett, 94 Ill. 475; Robinson v. McNeill, 51 Ill. 225; Graham v. Eisener, 28 Ill. App. 269; Whitemore v. South Boston Iron Co., 6 Allen, 52.

The defendant asked the court to give the following instruction :

“The jury are also instructed that there is no special warranty or guaranty in the written contract that the property should be of any quality, and in the absence of such a warranty or guaranty the presumption is the plaintiff was buying at his own risk, and relying on his own judgment,” which instruction the court refused to give the jury. The written contract containing no warranty, and there being an express contract, no contract of warranty could exist by implication; the law must presume there was no warranty, and the purchaser bought at his own risk and on his own judgment, and the contract being in writing, it was the duty of the court to construe it and instruct the jury it contained no warranty. Walker v. Brown, 28 Ill. 378; Ogden v. Kirby, 79 Ill. 555; W., St. L. & P. Ry. Co. v. Jaggerman, 115 Ill. 407.

This instruction should have been given as asked. Nor will the fact that the defendant was to do certain work on the boiler, change the character of the written contract. For if it be admitted that he was to place the same in position, yet the evidence of the plaintiff is that the boiler sold to him was to be a second-hand boiler; in such case no implication arises that a warranty exists that the article, sold as second-hand goods, will answer the purpose for which made. Archdale v. Moore, 19 Ill. 565; Kohl v. Lindley, 39 Ill. 195; Misner v. Granger, 4 Gilm. 69. An express contract in writing could not exist as to one part of the contract, and an implied one of the vendor as to another part of the same contract, growing out of the same transaction and the same in point of time. The instruction asked by plaintiff and given by the court, which proceeded on the theory of an implied contract, should not have been given. We do not deem it necessary to discuss questions raised by the assignment of errors, as to damage, based on proof that the mill was idle and there was a loss of profits. Proof was allowed to go to the jury of the cost of repairs of

the boiler, and the principal basis of the claim for damage was on the theory that the boiler was not in good condition, and would not do the work, and much expense was incurred in its repair. A *remittitur* has been entered in this court for a part of the sum for which judgment was rendered, but that can not cure errors of law occurring on the trial going to the right of recovery. The judgment must be reversed and cause remanded.

Reversed and remanded.

JOHN F. MEIXSELL

V.

THOMAS B. FEEZOR.

Trespass—Cutting of Trees—Practice—Leading Questions—Hostile Witness.

1. It is not necessary in trespass to describe in the declaration the close on which the trespass was committed.
2. In such case the questions of possession and the commission of a trespass are for the jury to decide from the evidence adduced.
3. One directing a person to cut timber in certain places is responsible for a trespass of such person upon the lands of others, they having been included in the directions given.
4. Leading questions are proper where a witness is hostile.

[Opinion filed February 26, 1892.]

APPEAL from the Circuit Court of Pope County; the Hon. R. W. McCARTNEY, Judge, presiding.

Mr. W. H. BOYER, for appellant.

Mr. W. H. MOORE, for appellee.

PHILLIPS, J. This is an action of trespass resulting in a verdict and judgment for plaintiff, and the defendant brings

the record to this court by appeal. The errors assigned are the admission of evidence and the overruling of a motion for new trial and in arrest of judgment. The declaration charged the cutting of trees and saplings on plaintiff's land, and it is insisted that as no lands are described in the declaration it was error to admit evidence of the ownership of particular lands, and that a motion in arrest of judgment should have been sustained. It is not necessary in trespass to describe in the declaration the close on which the trespass was committed. It is said in 1 Saunderson's Reports, 299, note b: "It was anciently the most usual practice in trespass *clausum fregit* to declare generally of breaking the plaintiff's close at 'A.'" This general mode of declaring put the defendant under a difficulty of knowing in what part of the will of "A" the trespass which the plaintiff meant by his declaration was committed. The defendant was therefore permitted to plead that the close was his freehold, which he might do without giving it a name, because as the plaintiff was general in his count the defendant might be as general in his plea.

And if the plaintiff traversed it, he ran a great risk; for if the defendant had any part of his land in that will the verdict would be for him on that issue. This turned the difficulty upon the plaintiff, and therefore he was almost always driven to a new assignment in which he ascertained the place with proper exactness; and to sustain this proposition the reporter cites 1 Salk. 453; *Helwes v. Lambe*, S. C., 6 Mod. 117; as cited by Wells, C. J., in *Lambert v. Strother*, Wells' Rep. 223, 2 Black. 1089. In the discussion of this question the same authority says that "It is now the usual way in all courts at Westminster and particularly in C. B. by rule of court A. D. 1664, to ascertain the place in the declaration." In Great Britain under the new rules adopted at Hilary Term, 4th W. 4, the rules expressly require that the name of the close or the abutments or some other description be designated in the declaration. It is of this rule that Mr. Chitty in his work on Pleading, Vol. 1, 376, is speaking when he says: "In order to avoid the necessity of a new assignment, the pleading rules require the name of the close or abutments or some other de-

scription to be used in the statement or that the defendant may demur specially." It is also of this rule that Mr. Saunders in his work on Pleading and Evidence, Vol. 2, 1094, is speaking when he says: "In actions of *q. c. j.* the close or place in which, etc., must be designated in the declaration by name," etc. Mr. Gould in his work on Pleading, 170, says: "In trespass *quare clausum fregit* also, the close must be described as lying in a certain parish and county named; and it is held advisable to set out also the abuttals or name of the close." He cites to sustain this proposition Chitty on Pleading, 2 Black. R. 1089, Ball N. P. 89.

We have already discussed the rule as stated by Mr. Chitty and on what it is based. Mr. Gould further says: "In the United States in which closes or parcels of land are not in general known by particular ancient names, a description by abuttals or by lines and distances would seem generally indispensable." He, however, cites no authority to sustain this statement. In 9 Wentworth on Pleading, 148-9, where a form of declaration is given in which the close is not described, it is said in a note, "It would have been proper to have stated the name of the close though it is not necessary to do it. If the defendant plead *liberum tenementum* the plaintiff must make new assignment." The same is substantially stated in note "C" to page 868 of Vol. 2, Chitty on Pleading. While it is the better form of pleading to state a description of the close by name, abuttals or numbers in the declaration, yet, at common law, a declaration that omits description of a close is good. The evidence of ownership of a particular tract of land and the commission of a trespass thereon in the manner set out in the declaration was admissible under the declaration.

The questions of possession and the commission of a trespass was for the jury, and there was evidence to authorize and sustain the verdict. It is argued that there is no sufficient evidence connecting the defendant with the acts of trespass testified to being committed. The plaintiff offered in evidence a deed conveying to him the tract on which the trespass was committed. The defendant had employed one Leverett to cut timber from a certain tract of land owned by him, and

Whitesides v. Cook.

which adjoined plaintiff's land. To Leverett he gave certain instructions as to cutting, Leverett cutting by contract and employing his own hands. There was evidence as to the defendant showing Leverett the land on which to cut, and directions as to the line, and if he contracted with Leverett to cut on his land and by his directions as to corners and lines, Leverett was so directed by him that he cut on plaintiff's land, the defendant would be liab'e. Objection was made to certain questions asked by plaintiff's counsel as to the form of questions. It sufficiently appears that certain witnesses were hostile and under such circumstances leading questions were proper. The instructions correctly stated the law. The motion in arrest of judgment was properly overruled.

We find no reversible error in the record. The judgment is affirmed.

THOMAS V. WHITESIDES ET AL., TRUSTEES, ETC.,

V.

CYRUS L. COOK.

43	183
64	182

Agency—Collection of Subscriptions Due Church—Purchase of Indebtedness of—Practice.

1. Upon a second appeal, an appellate court will not consider questions passed upon and determined on a former appeal.

2. An agent employed to settle a debt can not purchase it for himself. One who agrees to act for another is not allowed to deal in the business of his agency for his own benefit, or to do an act having a tendency to interfere with the proper discharge of his duties.

[Opinion filed February 26, 1892.]

IN ERROR to the Circuit Court of Madison County; the Hon. E. R. BURROUGHS, Judge, presiding.

Messrs. HAPPY & TRAVOUS, for plaintiffs in error.

Mr. A. W. METCALFE, for defendant in error.

PHILLIPS, J. This cause was before this court at the August term, 1886, and the opinion as filed is reported in 20 Ill. App. 574. On the cause being remanded, an amended bill was filed to cancel the note and mortgage in the bill and cross-bill described. The defendant to the original bill filed an amended cross-bill, and on answers being filed to the amended bill and amended cross-bill and replications thereto, the cause was heard. The evidence shows that Cook was one of the trustees and was active in the work of the church. Numerous subscriptions had been procured which were sufficient in amount to pay off the church debt. Henry L. Field was preaching in the church and procured certain subscriptions in Alton and at other places, and proposed to Cook that he would collect all that had been procured except those at Edwardsville, Troy and Bethel, if he, Cook, would collect those and see that the church debt was entirely paid off. Cook assented to this, and Field collected and paid over all he promised to collect, and the subscriptions at Edwardsville, Troy and Bethel were turned over to Cook, who took possession of them and retained them up to the time of filing the original bill in this cause. He reported and consented to reports made from time to time, that the church was substantially out of debt, and on October 18, 1876, wrote Field: "In reference to the matter of the church subscriptions, it is my intention to, if possible, have this all settled by the first of January. Just at this time I can not act in the matter, as I am compelled, being a candidate, to take quite an active part in the political campaign." On November 2, 1876, Cook purchased of one Keller a note that was the outstanding indebtedness of the church; that note was secured by a trust deed which was not recorded until October 10, 1884, and during all the time that has elapsed from the time of his purchase of the note he retained possession of the assets of the church, which was the subscription list to pay the debts of the church. Within a short time prior to the purchase of the note, he stated that he expected to have it all settled by the first of January. The evidence

shows that he accepted the subscription list and promised to collect the same, and see that the church debt was paid. When this case was before us heretofore we said: "Having undertaken this agency he was bound to perform the duties thereof, consistent with, and not adverse to the interest of the church for which he was agent; as such he can not be permitted to neglect the collection of these assets; and proper application of the sums collected induce his principal, by acts and reports, to believe he was performing his duty as agent, secretly purchase his note, hold it as an interest-bearing indebtedness for years, and then enforce the payment of the principal and accrued interest; even if he undertook this agency without reward and commenced to perform the duties, he was bound to proceed and execute it with the same diligence as if paid. Text writers on agency and trusts, as also our Supreme Court, have laid down and enforced as rules applicable here, that an agent employed to settle a debt can not purchase it for himself, and one who agrees to act for another is not allowed to deal in the business of his agency for his own benefit, or to do an act having a tendency to interfere with the proper discharge of his duties." The allegation of the cross-bill is substantially the same as to the facts alleged, and the same as to the relief prayed in the amended cross-bill now in this record as in the original cross-bill. The facts to sustain the cross-bill are substantially the same now as then, except that evidence is offered to show that certain persons whose names are on the subscription list held by Cook were at the time, and since, insolvent. Be that as it may, in the cause when before us, it was ordered in the opinion then filed that the decree of the Circuit Court be reversed and the cause remanded for further proceedings, in accordance with the views therein expressed.

In such case on a second appeal, where a certain mode of proceeding has been marked out in the opinion, and the direction is to proceed consistently therewith, any other mode of proceeding is excluded. *Hook v. Richeson*, 115 Ill. 431; *Gage v. Bailey*, 119 Ill. 539; *Parker v. Shannon*, 121 Ill. 452. It is said in *Ogle v. Turpin*, 8 Ill. App. 453, "It has been uni-

formly held by our Supreme Court and by the Supreme Court of the United States that on a second appeal those courts will not consider any questions which have been passed upon and determined by them on a former appeal, but that all such questions are to be regarded as *res adjudicata*," and in that case numerous authorities are cited as sustaining that proposition.

The first adjudication in this case by this court, fully determined and settled the rights of appellee under the cross-bill, and so far as that cross-bill is concerned, the only proceeding which was consistent with that opinion was that the court should, when the cause was remanded, dismiss the cross-bill. *Parker v. Shannon, supra*. The original bill was amended in accordance with the views suggested in the opinion in 20 Ill. App., and the court thereupon ordered that the complainants in the original bill should pay all costs up to that time. The litigation had been chiefly in reference as to whether there was anything due Cook, as alleged in his cross-bill and in his answer, and that having been adjudged adverse to him, it was error to order the complainants to pay all costs up to the time of the amendment; after that amendment to the original bill, and it having been adjudged that the trustees were not indebted to Cook, and that he had no claim against the church, it was error to not enter a decree as prayed in the amended bill under the evidence appearing in the record, and it was error to decree relief on the cross-bill and foreclose the deed of trust. The second decree entered by the Circuit Court is reversed, and the cause is remanded, with directions to proceed as indicated in *Whitesides v. Cook*, 20 Ill. App. 574.

Reversed and remanded with directions.

ELIZABETH E. BLAIR

V.

ESTATE OF GEORGE W. GUTHRIE.

Administration—Claim—Agency.

Upon a claim filed against the estate of the ex-guardian of claimant, the

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same being alleged to call for an amount received by him as guardian and never paid over, a certain receipt having been given by her to him in his lifetime, in full of all demands, this court declines to interfere with a judgment in her favor for a sum named.

[Opinion filed February 26, 1892:]

APPEAL from the Circuit Court of St. Clair County; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Mr. CHARLES W. THOMAS, for appellant.

Messrs. G. & G. A. KOERNER, R. J. GODDARD and M. McMURDO, for appellee.

SAMPLE, J. Elizabeth E. Blair, *nee* Johnston, filed a claim in the County Court against the estate of George W. Guthrie for the sum of \$3,600, where, upon the trial before the judge of the court without a jury, her claim was allowed in the sum of \$267, from which judgment an appeal was taken to the Circuit Court, and upon trial there before the court, the same judgment was rendered, and an appeal again taken to this court, where the only error assigned is that the judgment was for too small a sum. As conceded, the question is wholly one of fact.

There are four items involved, which for convenience may be called the Anderson, Wright, rent, and collection of desperate claims items, on the part of the plaintiff; while on the part of the defendant there is a general denial of the validity of these items, and a set-off in the way of a claim of the payment of taxes on claimant's land, and the deeding to her and her sisters of land, the claimant's share of which was \$800. We have read the full record of this evidence, and while not able to determine with exactness the basis upon which the findings of the two courts below was made, yet as these courts had the witnesses before them, and the points at issue are entirely of facts, we are not disposed to disturb those findings.

The Anderson item, in regard to the balance due on a fore-

closure, is the only claimed indebtedness that arose after the giving of the following receipt on the part of this claimant:

"Received of Geo. W. Guthrie, my acting agent, the sum of \$2,659.36, in full of all demands against the said Geo. W. Guthrie.

" ELIZABETH JOHNSTON.

" Dated August 20th, 1883."

If the court gave full credit to this receipt and allowed in full the balance due on the Anderson note, and also allowed the estate credit for the set-offs, then the claimant got judgment for all she was entitled to. We call attention to the fact that there is nothing in the bill of exceptions in this case, to indicate what the receipt to Guthrie for \$2,659.36 was given for, except what is purported on its face. The import of it is that Guthrie had been the claimant's agent, and on the 20th day of August, 1883, she had received a certain sum of money in full of all demands against him. For the reasons stated the judgment is affirmed.

Judgment affirmed.

43 188
142 357

TIRZA A. KATTELMAN

V.

ESTATE OF GEORGE W. GUTHRIE.

Guardian and Ward—Receipt in Full—Jurisdiction of Circuit Court.

1. Compound interest can not be recovered from the estate of a deceased guardian, who, at his death, was indebted to his ward in a given sum, unless there was a wilful withholding of the funds, in case of a suit by the ward against the estate for such funds so held as guardian.

2. If the ward, after attaining majority, and without any fraud being perpetrated, permits his ex-guardian to retain and handle such funds, compound interest can not be allowed.

3. Upon a claim filed against the estate of an ex-guardian of claimant, the same being alleged to cover an amount received by him as guardian and never paid over, a certain receipt having been given by her to him in his lifetime, in full of all demands, this court declines to interfere with judgment in her favor in a sum named.

Kattelman v. Guthrie.

[Opinion filed February 26, 1892.]

APPEAL from the Circuit Court of St. Clair County; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Mr. CHARLES W. THOMAS, for appellant.

Messrs. G. & G. A. KOERNER, and R. J. GODDARD and M. McMURDO, for appellee.

SAMPLE, J. The deceased, George W. Guthrie, as the guardian of Tirza A. Kattelman, *nee* Johnston, received and controlled her estate as such, until November 2, 1881, when he made his final report to the County Court, which showed that the amount of the estate in his hands was \$4,298.08. With his report he filed the following receipt of the appellant:

“Received of Geo. W. Guthrie, my guardian, the sum of \$4,298.80 in full of all claims against him as such guardian, and I do hereby acknowledge the foregoing settlement as correct.

“TIRZA A. JOHNSTON.

“November 2, 1881.”

Thereupon the court approved said report and ordered it to be filed and recorded. This receipt, as testified to by the clerk of the court, was signed understandingly by her, and after she had arrived at her majority.

There is no evidence in this record that Guthrie was guilty of any fraud or misrepresentations to induce her to sign it. He was her uncle, and doubtless she had confidence in his business ability and integrity to properly control and invest her money thereafter. This is implied from the fact that so far as disclosed by this record, he was not asked to pay it over until the 10th day of February, 1888, two days before his death. Had there not been some understanding or agreement between the parties, evidently the matter would not have been allowed to drag along for a period of over five years without some steps being taken to collect it, or at least de-

mands made upon him. After Guthrie's decease, his wife, Rebecca, was appointed administratrix of his estate, and Tirza A. Kattelman filed a claim in the Probate Court against the estate for the sum of \$7,500, about the last of December, 1889, where, upon trial before the judge of the court, the sum of \$3,723.54 was allowed, from which judgment an appeal was taken to the Circuit Court, where, upon trial before the judge of that court, a judgment for the same amount was entered, from which judgment and finding an appeal was taken to this court, where error is assigned that the court gave judgment for too small a sum, upon which assignment three points are made by appellant, viz.:

First. Does the evidence sustain the contention that Guthrie bought the Nixon land and improved it with his ward's money?

Second. Could he get any credit for the outlay if he had?

Third. Is Guthrie's estate liable for compound interest?

The first and third questions arise upon the facts developed by the evidence. That evidence has been carefully examined, and in view of the fact that the judges of two courts that had the witnesses before them, have found in the same way, we do not feel disposed to disturb those findings, or to enter into an analysis of the evidence in detail to show why we are disposed to believe that they are sustained. They involve controverted questions of fact, especially as to whose money paid for the Nixon land and the improvements. Mrs. Fellows, the mother of claimant, testified that her money paid for that land and the improvements. Her evidence on this point is directly contradicted by that of Mr. and Mrs. Baden. In addition to this direct evidence, the circumstances and nature of the transaction considered in all its features seem to support the defense.

As to compounding the interest, that should only be done in case of a wilful withholding of the funds, in case of a suit by the ward against the estate for such funds so held as guardian. If the claimant, after her majority and without any fraud being perpetrated, permitted Guthrie to retain and handle such funds, then of course no compound interest could

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be allowed. As to the second point made, that the estate was not entitled to credit for the \$2,200, although Guthrie did pay for the lands and improvements out of this ward's money which was conveyed to and received by her, we do not think it well taken. By the allowance of this credit, the order of the County Court is not necessarily attacked, which found there was a certain amount due the ward on final settlement. This land transaction was an outside matter which, as appears from the evidence, was personal as between the parties. It may be fairly inferred that the parties treated it as a transaction between them as debtor and creditor, and not as guardian and ward. The court below having found that Guthrie conveyed to this claimant and that she received and retained the land, and paid him nothing for it, he should receive credit for the amount that he expended in her behalf, unless the rigid rule of law invoked by appellant forbids it, which we do not find, for the reasons above stated, to interfere with its allowance. We can not consider the point made in the brief of appellee's counsel, that the Circuit Court could not, under the new law, take jurisdiction of the appeal from the County Court for the reason that no cross-errors were assigned. The judgment is affirmed.

Judgment affirmed.

JAMES M. ROBNETT ET AL.

V.

SALLY A. ROBNETT.

Administration—Claim of Daughter—Witnesses—Subdivision 4, Sec. 1. Chap. 39, R. S.—Sec. 5. Chap. 51, R. S.—Presentation of Claim—Costs.

1. In a controversy involving a claim by a child against his father's estate for services rendered for the father at his request, the fact that the mother of such claimant is administratrix of her husband's estate, will not prevent her from testifying in his behalf, nor will the relation to the estate of such administratrix by way of her interest under the statute regarding descents, prevent her being called as a witness in such case.

2. A mother may in such case testify that at her deceased husband's request she wrote a letter to a child of age and earning his living at a distance, asking him to return home and remain. She acts in such case as agent of her husband in view of Sec. 5, Chap. 51, R. S., but she will not be allowed to testify as to labor performed, money advanced and the like.

3. Where in such case such child returns and takes part in the labor incident to home life, although there is no express agreement for compensation, an intention to compensate will be implied.

4. While a claimant who does not file his claim in the County Court on the day of adjustment may be liable for costs, this does not follow upon appeal from judgment for the claimant to the Circuit Court as to the costs therein.

5. Although the claimant in such case is not competent as a witness in chief, he is competent to testify in rebuttal to conversations and transactions testified to by other witnesses called by the opposite party.

[Opinion filed February 26, 1892.]

APPEAL from the Circuit Court of Marion County; the Hon. WILLIAM H. SNYDER, Judge, presiding.

Messrs. H. C. GOODNOW and CASEY & DWIGHT, for appellants.

In support of this claim appellee offered in the court below the evidence of Mrs. E. C. F. Robnett, widow of deceased, and administratrix of the estate, who testified that her husband, then sick, told her to write for appellee to come home, which was done, and appellee returned home.

We insist the widow was not a competent witness, and it was error to permit her to testify. *Reeves v. Herr*, 59 Ill. 81; *Trepp v. Baker*, 78 Ill. 146.

And the intestate simply telling his wife to write for appellee to come home, did not create an agency out of which could grow the contract relied upon by appellee. *Trepp v. Baker*, 78 Ill. 146.

Where services are rendered within the family, there can be no recovery against the head of such family unless it be shown either that there was an express promise to pay, or that the services were rendered under the expectation of receiving pay therefor on the one side, and under the expectation of paying therefor on the other side. *Myers v. Malcom*,

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20 Ill. 621; Freeman v. Freeman, 65 Ill. 106; Miller v. Miller, 16 Ill. 296; Morton v. Rainey, 82 Ill. 215; Guffin v. National Bank, 74 Ill. 259; Dunlap v. Allen, 90 Ill. 108; Ginders v. Ginders, 21 Ill. App. 522; Patterson v. Collar, 31 Ill. App. 340.

A son or daughter of a parent residing with the parent, does not cease to be a member of the family when they respectively arrive at the age of twenty-one or eighteen, from that fact alone. C. & N. W. Ry. Co. v. Chisholm, Jr., 79 Ill. 584.

If a child remains with a parent after majority in the same apparent situation as when a minor, in the absence of a contract, no recovery can be had for services rendered. Miller v. Miller, 16 Ill. 296; Morton v. Rainey, 82 Ill. 215; Cooper v. Cooper, 3 Ill. App. 495.

In such cases the presumption arises that the parties did not contemplate the payment of wages for the services rendered. Freeman v. Freeman, 65 Ill. 106; Cooper v. Cooper, 12 Ill. 478.

A step-father will not be held to pay for the services of a minor step-son who lives in the family as a member of it, when the relation of parent and child exists, unless an express promise to pay for the services can be shown. Brush v. Blanchard, 18 Ill. 46.

Where a child lives with a parent, or a parent with the child, the relationship between the parties is so intimate, that the law does not imply a contract to pay money for support or services; unless it be shown that there is an express contract to pay for such support and services, a recovery therefor can not be had by one of the parties against the other. In the absence of an express agreement, the law indulges the generous presumption that what is done for each other by parties thus nearly related, is done gratuitously, and as the prompting of natural affection. Miller v. Miller, 16 Ill. 296; Brush v. Blanchard, 18 Ill. 46; Faloan v. McIntyre, 118 Ill. 292.

The heirs are competent witnesses for the estate in defense of this claim. Freeman v. Freeman, 62 Ill. 189; Byers v. Thompson, 66 Ill. 421.

The claimant is not a competent witness in her own behalf as to matters occurring before the death of her father. *Branger v. Lucy*, 82 Ill. 91; *Langley v. Dodsworth*, 81 Ill. 86; *Redden v. Inmann*, 6 Ill. App. 55.

Delay in the presentation of a claim is to be considered. *O'Connor v. O'Connor*, 52 Ill. 316.

This claim not having been presented at the adjustment term and no good reason having been shown why it was not, the costs should have been adjudged against the claimant. *Starr & C. Ill. Stats. 218, Sec. 63.*

There being no written pleadings in the probating of claims, the statute of limitations is supposed to be pleaded; and if the administrator fails to do so, the heirs may. *McCoy v. Morrow*, 18 Ill. 519.

Messrs. VAN HOOREBEKE & FORD and W. F. BUNDY, for appellee.

In *Reeves v. Herr*, 59 Ill. 81, the widow was called by the executor to prove a conversation of her husband's with the defendant touching the matter in controversy. The court held her incompetent. How could the court have held otherwise?

In *Trepp v. Baker*, 78 Ill. 146, it was sought to establish an agency in the wife by her testimony, because she was present with her husband when he purchased goods at a store and she helped select them. The court very properly held this would not constitute her his agent, and the wife was not a competent witness. But how different is this case.

In the case at bar she testified, not to conversations of her husband's, but to matters she knew *aliunde* of, except to matter of agency as already stated.

She was clearly competent in the case at bar under Sec. 2, Chap. 51, *Starr & C. Ill. Stats.* She was directly interested, but she testified against that interest; nor did she testify of her own motion or in her own behalf, but was called as a witness by the adverse party. *Douglas v. Fullerton*, 7 Ill. App. 102; *Stewart v. Kirk*, 69 Ill. 509; *Remann, Ex., v. Buckmaster*, 85 Ill. 403; *Rann v. Rann*, 95 Ill. 433; *Griffin v. Griffin*,

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125 Ill. 430; Campbell v. Campbell, 130 Ill. 466; Powell v. Powell, 114 Ill. 329.

These authorities fully sustain her competency.

It is insisted appellee is barred from recovering because the claim was not presented on the adjustment day, etc., and costs should have been adjudged against appellee.

We fail to see the merit of this point. Sec. 60, Chap. 3, Starr & C. Ill. Stats., provides the mode and manner of adjustment of claims, and Sec. 61 provides for allowance of claims presented after adjustment.

The administratrix having entered her appearance in this case no summons was necessary. Sec. 63 provides for trial as though claim had been presented on adjustment day, and provides, "That when defense is made the court may, if it shall deem just, order the whole or some part of the costs occasioned by such defense to be paid out of the estate."

In the absence of proof the presumption is that the claim was presented for allowance in due time, and that the estate is liable for costs. Welch v. Wallace, 3 Gilm. 490; Granjang v. Merkle, 22 Ill. 249.

PHILLIPS, P. J. A claim was filed by appellee against the estate of P. H. Robnett, deceased, for work, labor and services rendered during five years prior to his death. Appellee is a daughter of deceased. E. C. F. Robnett, the widow, is administratrix. A judgment was rendered against the estate in the County Court. An appeal was taken to the Circuit Court, when again appellee recovered a judgment. The plaintiff called as a witness the administratrix, who is the widow of deceased, who testified that several years prior to the death of P. H. Robnett, the appellee had been teaching school and living away from home, having left after she became of age, and some five or six years before the death of P. H. Robnett, he requested the witness to write and request appellee to come home, as she was needed at home, and in accordance with that request she wrote appellee, who came home and had since rendered service in the family most of the time. It is urged the administratrix, the widow of the deceased, is not a com-

petent witness to testify when called, for one who has presented a claim against the estate. So far as she occupies the position of administratrix, that relation of itself does not prevent her being a witness regardless of the party calling her. *Steele v. Clark*, 77 Ill. 471; *Remann v. Buckmaster*, 85 Ill. 403. Neither does her relation to the estate by way of the interest she has by Subdivision 4 of Sec. 1 of Chap. 39 R. S., entitled "Descents," prevent her being called as a witness. *Freeman v. Freeman*, 62 Ill. 189; *Byers v. Thompson*, 66 Ill. 421.

By the express provision of Sec. 5, Chap. 51, R. S., entitled "Evidence," she, as wife of the deceased, is made competent to testify "in all matters of business transactions, when the transaction was had and conducted by such married woman as the agent of her husband." If the husband was alive and suit brought against him for this claim by virtue of that section, the wife would be a competent witness whether called for or against him. His death would not disqualify her from being called as such witness under such circumstances when a claim is filed against the estate. She was a competent witness to testify that by the direction of her husband she had written a letter to the plaintiff requesting her to return home, that he needed her. Her act in making that request and its purpose was as agent of her husband. She would not be competent to testify to other facts in this case, as to labor performed, money advanced, and the like. It is further insisted that plaintiff's claim not having been presented on the day of adjustment, the costs should have been adjudged against her. The Circuit Court adjudged that the costs in the County Court should be paid by appellee, and that she should recover costs in the Circuit Court, to be paid in due course of administration. This was in conformity to the statute, and was not error. While the plaintiff who does not file her claim on the day of adjustment may be liable for costs in the County Court, it does not follow that costs of the Circuit Court should be taxed against her. It is further urged that the evidence does not make a case where appellee would be entitled to recover; that she was of age and away from home is shown, and that

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the intestate requested her return as she was needed. It further appears that from her return home she was engaged in rendering service in various ways, that she took an active part in the household duties and the work on the farm, engaging in fruit raising and other work, and having stock on the farm. It is true there does not seem to have been any special agreement that she was to be paid for her services, but being of age and away from home to make her own living, and returning home under the request shown, and afterward rendering services, there was evidence to warrant a finding, there was an implied agreement to pay. As was said in *Freeman v. Freeman*, 66 Ill. 106, "After leaving, the presumption arises that he thenceforth intended to labor and accumulate property for himself, and when he returned at the solicitation of the father it is but a reasonable presumption the father intended to pay, and he to receive pay for his labor. * * * " In some respects the cases are alike and there is evidence to sustain the finding by the court that there was an implied promise to pay appellee for services so rendered. The appellee was offered as a witness in her own behalf in rebuttal and objected to as incompetent, and objection overruled, to which appellant excepted. While she is not competent as a witness in chief, yet she is competent to testify in rebuttal to conversations and transactions testified to by other witnesses called by appellants by Sec. 2 of the chapter entitled "Evidence and Depositions." She was a competent witness on these facts. *Penn v. Oglesby*, 89 Ill. 110; *Plain v. Roth*, 107 Ill. 588. Except as to such facts, appellee was incompetent as a witness. From the entire evidence that was competent in the record there was evidence to sustain the verdict; and although certain questions and answers of appellee were inadmissible, and certain questions and answers asked the widow were inadmissible, yet on trials before the court without a jury, that evidence, as here, was not misleading, and to the prejudice of appellants. Objection is made to certain propositions of law held for appellee. The third proposition held is: "The court instructs you that if you find from the evidence that the plaintiff within five years last past and before

the death of P. H. Robnett, paid out and expended her own money in and about the necessary expenses of the family and farm of said P. H. Robnett, and with his knowledge and consent, then it raised an obligation on him to repay the plaintiff, and she may now recover against the estate such sum as you find from the evidence remains unpaid, if any remains unpaid, not exceeding the amount of plaintiff's claim." It is urged that the proposition allows a recovery for more than five years prior to filing the claim. It is, "If within five years last past and before the death of P. H. Robnett," the appellee paid out money, etc. We do not believe this proposition is subject to the objection urged. This claim was filed in the County Court, and on appeal by the administrator was brought to the Circuit Court, and then a judgment for \$600 rendered for appellee against the estate, and this appeal to this court is brought by the heirs. From the entire evidence in the record we do not find such errors that we ought to reverse this judgment. The judgment is affirmed.

Judgment affirmed.

B. M. ROWLAND

v.

W. M. RECORDS.

Master and Servant—Recovery of Wages—Traveling Salesmen—Duty of—Attorney's Fees—Laws of 1889, 362.

1. It is for the jury to determine what the oral contract of service was in a given case, and whether it was complied with by the employe.

2. The law impliedly imposes upon a traveling salesman the duty of exercising reasonably good judgment and care in making sales.

3. This court holds that the evidence in the case presented did not warrant the allowance of the attorney's fee in question.

[Opinion filed February 26, 1892.]

APPEAL from the County Court of Richland County; the Hon. T. A. FRITCHEY, Judge, presiding.

Mr. J. C. ALLEN, for appellant.

Mr. EDWARD KERSHAW, for appellee.

SAMPLE, J. This suit was brought by appellee to recover an alleged balance due him from appellant, for services rendered in selling trees or nursery stock. It is agreed that he was to receive \$100 per month and pay his own expenses. It appears from the evidence that appellee had worked for appellant before the last employment on a commission, and appellant claims that it was a part of the salary contract that appellee was to perform the work as well as when he worked on a commission, and that his sales were to amount to as much. This is denied by appellee. Appellant also claims that appellee did not follow instructions to sell for cash, and also failed to exercise good judgment in making contracts of sale of trees, in that he sold to irresponsible parties, so that the deliveries only amounted to fifty per cent of the contracts of sales, whereas when he sold on commissions the delivery amounted to ninety per cent of the sales. He testified that if appellee had done his work according to the contract, that the amount of appellee's claim would be correct, but as so many bad sales were made he owed nothing and was entitled to damages.

The case was tried before a jury which found for appellee the amount of his claim, \$103.80, upon which judgment was entered, after a motion for a new trial was overruled, and the court also, without any proof being made, entered a judgment for \$10 additional, as attorney's fees, which is assigned as error.

It was for the jury to determine what the real contract between the parties was, and also whether or not appellee had complied with it. It is clear that he did not agree to be responsible for all or any of the sales that he made. The law however, impliedly imposed upon him the duty of exercising reasonably good judgment and care in making sales. Whether he did this or not was fairly submitted to the jury and we do not feel disposed to disturb the verdict for that reason,

although the explanation of appellee about some of the deliveries is not entirely satisfactory.

We are compelled, however, to reverse this case on the assignment of error as to the allowance of the \$10 attorney's fee by the court. That was allowed under the Wages Act of 1889. See Laws of 1889, 362. That act provides, "That wherever an employe * * * shall have *cause* to bring a suit for wages * * * and *shall establish* by the decision of the court or jury, that the amount for which he or she has brought suit is justly due, * * * and that a *demand* has been made in writing *at least three days before suit is brought for a sum* not exceeding the amount so found due, *then* it shall be the duty of the court * * * to allow to the plaintiff, *when the foregoing facts appear*, a reasonable attorney's fee," etc. There is no pretense in this case, that any such proof was offered or made as is expressly required by that act, in order to authorize the court to allow any attorney's fee. The purpose of the legislature in requiring that preliminary proof doubtless was to protect parties from being compelled to pay attorney's fees in suits where no demand had been made on them, or where the demand was for too much. It will be observed that the demand provided for must not exceed the amount established to be due on the trial. If it does, then no attorney's fee can be recovered.

For the error indicated the judgment will be reversed, and the cause remanded.

Reversed and remanded.

A. W. METCALFE

V.

HENRY GUNKEL.

Practice--Imperfect Record.

This court declines to interfere with the judgment for the defendant in the case presented, the record not purporting to contain all the evidence introduced in the court below.

Metcalf v. Gunkel.

[Opinion filed February 26, 1892.]

APPEAL from the Circuit Court of Madison County; the Hon. B. R. BURROUGHS, Judge, presiding.

Mr. A. W. METCALFE, for appellant.

Mr. T. L. GAERTNER, for appellee.

SAMPLE, J. The declaration filed in this cause counts in trespass and case. The first count charges trespass to the plaintiff's close, to wit, a strip of land one rod wide meandering along Cahokia Creek for some distance, purchased by the plaintiff for the purpose of obtaining a private way to his lands. The second count in case charges defendant with obstructing such way by making a ditch across same and constructing an embankment so as to divert the water in case of overflow of Cahokia Creek so that it is turned upon plaintiff's land, injuring the same, and into said ditch crossing said way so that the wash thereof will so deepen it as to require plaintiff to construct a bridge at a large expense, to wit, at an expense of \$300. The defendant pleaded not guilty and license as to first count, and not guilty as to second. Trial was had before a jury which found for defendant, and the motion made by the plaintiff for new trial was overruled, and the case is brought here with the usual assignment of errors, all of which are insisted upon in the argument of counsel for appellant. The issues joined in this case simply raises the question, first, whether the defendant had trespassed upon the plaintiff's private way, or if he did, was he licensed so to do. Second, whether he had dug or plowed a ditch across that way and raised an embankment and thereby diverted water, through the ditch, so as to wash and deepen it so that plaintiff would have to build a bridge, and that such water so diverted would also overflow plaintiff's lands adjoining. These were questions of fact for the jury. In order to determine the correctness of that finding we have read and examined carefully the full record, which does not purport to contain all the evidence

introduced. On record page twenty-one, the plaintiff testified that the defendant's land had been cultivated up to within about five feet of the bank of the creek, and then the record states, "Witness takes the plat and explains to the jury in regard to the levee and ditch." Again, this appears in record: "Here follows a long explanation of plat as to water, direction of creek, ditch, and levee, and where the water stood." Then the next question is, "What are your damages by reason of this water you speak of; state to the jury definitely." That question, from its context, evidently related to what the witness had told the jury, of which this court is in ignorance. On record page twenty-four, this appears: "Then follows a long explanation of the plat as to the embankment, the direction of the creek, the water across the plaintiff's bottom land, where the ground in question was plowed, and the points where the tenants traveled, also the narrow place in road, the points where certain tree or trees stood, their size, etc., and the direction of dyke."

On page twenty-six of record this appears in regard to the evidence of Leverett, the surveyor, an important witness: After being asked a few preliminary questions, "Then the witness is interrogated on the plat as to distance, points, and meanderings of creek, the ditch, dyke, public road elevations on surface of ground, the direction the water would run." The vital part of the evidence of several other witnesses seems to have been omitted in the same way on pages twenty-nine, thirty and thirty-four of this record. On page forty-four such summarizing is concluded with these words: "Plat, plat, *ad nauseum*." It does not need the citation of authorities to show that this court can not properly try a case on such a record, when the assignments of error are directed at what occurred on the trial. Judgment is affirmed.

Judgment affirmed.

W. D. GRISWOLD ET AL.
V.
MARY JANE BROCK ET AL.

Real Property—Contract to Sell—Specific Performance.

1. It is too late for a person in possession of lands under a contract to convey, to object to a deed tendered after examining the same, and stating that it was satisfactory.

2. Upon a bill filed, asking that the purchase price of certain lands in possession of the defendants be paid with interest, or that an account be taken of rents and profits derived from said lands, and the original purchase money with the rents and profits should be paid, a certain contract of sale thereof having been entered into, the defendants having paid a nominal sum and entered thereon, this court holds, that complainants were not barred through *laches*, from maintaining their bill, and declines, in view of the evidence, to interfere with the decree in their behalf.

[Opinion filed February 26, 1892.]

APPEAL from the Circuit Court of St. Clair County; the Hon. B. R. BURROUGHS, Judge, presiding.

Mr. W. C. KUEFFNER, for appellants.

A contract to sell and convey real estate can only be performed by giving a deed that will vest in the grantee an unincumbered title. *Delavan v. Duncan*, 49 N. Y. 485.

When a man buys a piece of land, and contracts for a conveyance in general terms, the presumption is that he expects the title, and the grantor should be required to give him a perfect title. *Atkins v. Barnett*, 19 Barb. 643.

“The rule in equity is clear and well established, requiring a perfect title to be made, unless the contrary has been agreed. A person is never supposed to be desirous of purchasing a law suit, or a title attended with doubt and vexation, instead of one upon which he can quietly repose. Mr. Sugden says: “A court of law will look as anxiously to see that the title is clear of doubt, as a court of equity would.” *Hill v. Hobart*, 16 Maine, 164.

An agreement to convey land or estate, or a title to it, can be performed only by conveying a good title. *Ib.*

Where one agreed to "sell and convey" a lot of land for an agreed price, to be paid at a time subsequent to the giving of the deed, held, that a tender of a deed of warranty, while the land was under the incumbrance of a mortgage, was not a fulfillment of the covenant. *Sibley v. Spring*, 12 Fairf. (Me.) 460.

A vendee under an executory contract can not be compelled to accept a title made out by presumption from length of possession. *Tevis v. Richardson*, 7 T. B. Mon. (Ky.) 564.

A vendor of land in his own right is bound to convey it with general warranty, unless it is otherwise agreed between the parties. *Hoback v. Kilgore*, 26 Gratt. (Va.) 442.

Color of title, as this court has repeatedly held, is not a perfect title. *Payne v. Markle*, 89 Ill. 69.

One who agrees to sell real estate, impliedly agrees to give a good title, unless the liability is expressly excluded. *Moulton v. Chapee*, 22 Fed. Rep. 26.

"A familiar rule of interpretation requires that we shall give force and effect to all the words employed by the parties in expressing their agreement, when that is possible." *Bowman v. Long*, 89 Ill. 19.

Where a party agrees to convey land, and nothing is said as to the character of the conveyance, and nothing connected with the transaction to indicate the species of conveyance intended, the law implies a deed in fee simple with covenants of general warranty. *Witter v. Briscoe*, 13 Ark. 422; *Varde-man v. Lawson*, 17 Tex. 10; *Goddin v. Vaughn*, 14 Gratt. (Va.) 102.

Where a party has agreed to "convey" certain real estate, it is not enough for him to show that he has tendered a deed for it, but he must show that he had a title to it at the time, so that his deed would have conveyed the property. *Abend-roth v. Greenwich*, 29 Conn. 356.

A general presumption is that a contract to convey is a contract to convey a good title. *Schreck v. Pierce*, 3 Ia. 350.

A deed conveying not the land, but all the grantor's interest

in land, is color of title only to the extent of the grantor's interest. *Busch v. Huston*, 75 Ill. 343.

“In order to take the benefit of the limitation under claim and color of title, the payment of taxes must be by the person who holds the color of title. If the taxes for any of the seven years were paid by one in whom the title was not existing, the limitation fails.” *Fell v. Cessford*, 26 Ill. 522.

“Where a party seeking to acquire title under the seven years' limitation act, allows the land to be sold for taxes during the running of the statute, and afterward redeems from such sale, he will be required to begin *de novo*, and wait the required time for a deed.” *Wettig v. Bowman*, 47 Ill. 17.

A party who claims title under color of title, possession and payment of taxes, must have acquired his color of title in good faith. Chap. 83, R. S. of 1874, Sec. 6; R. S. of 1845, p. 104, Sec. 8, relating to conveyances.

“Color and claim of title may be made in good and bad faith. The good or bad faith is not the result of color of claim. The faith, whether good or bad, depends upon the purpose for which the deed is obtained, and the reliance placed upon the claim and the color. A party receiving color of title, knowing it to be worthless, or in fraud of the owner's rights, although he holds the color and asserts the claim, can not render it availing, because of the want of good faith.” *Hardin v. Gouverneur*, 69 Ill. 144.

“Claim of title in good faith is claiming in the sincere belief to be the owner of the premises. The good faith required in the acquisition of color of title is a freedom from a design to defraud the person having a better title.” *Davis v. Hall*, 92 Ill. 85; *McCagg v. Heacock*, 34 Ill. 476.

“A purchase of land at a sale for taxes by one whose duty it was to pay the taxes, will operate as a payment of the taxes only, and the purchaser will not be permitted to acquire any title by such a purchase.” *Lewis v. Ward*, 99 Ill. 525. To same effect *Busch v. Huston*, 75 Ill. 343.

Mere possession of the land, when the taxes for which it is sold is assessed, does not prevent the party from purchasing, but if the party in possession claims title to the land, or some

interest therein, he can not purchase. *Burroughs on Tax.*, 352; *McMinnus v. Whelan*, 27 Cal. 300; *Lacey v. Davis*, 4 Mich. 152.

If a party is in possession of land, claiming to be the owner, it is his duty to pay the taxes. *Seaver v. Cobb*, 98 Ill. 204.

"The person in whose name the land was listed and assessed for taxation (and whose duty it is to pay the taxes), can acquire no additional title by purchasing it at a tax sale." *Blackwell on Tax Titles*, marginal p. 399, 400; *Doughan v. Dangerfeld*, 10 Ohio, 152; *Ballance v. Forsyth*, 13 How. (U. S.) 18; *Voris v. Thomas*, 12 Ill. 442; *Glancy v. Elliott*, 14 Ill. 456; *Chambers v. Wilson*, 2 Watts, 495; *Garwood v. Hastings*, 38 Cal. 223.

"And where it appears that one was in possession of land, claiming title thereto, when certain taxes were assessed, it must be presumed that the land was assessed to him as owner or occupant, as the law required, and that it was his duty to pay the taxes; and he could, therefore, acquire no title by a purchase at the sale for such taxes." *Blackwell on Tax Titles*, marginal p. 399, 400; *Whitney v. Gunderson*, 31 Wis. 359; *Jones v. Davis*, 84 Wis. 229.

"A party holding by colorable title, in order to perfect it, must pay the taxes for seven successive years." *Elston v. Kennicott*, 46 Ill. 187. To same effect *Cooter v. Dearborn*, 115 Ill. 509.

"Inasmuch as the payment of taxes under color of title operates to defeat the paramount and all other titles, when relied on, the proof must be clear and convincing. Such titles should not be overcome by loose and uncertain testimony, or upon mere conjecture or violent presumptions." *Hurlbut v. Bradford*, 109 Ill. 397; *Perry v. Burton*, 111 Ill. 144. "To constitute color of title, the deed must purport to convey the title to the land of which it is claimed to be color of title."

In this case there was a question, whether the taxes had been paid for seven years. At first the party swore positively that he had paid them, but on cross-examination he admitted that he could not be positive. His testimony was very much like that of Mr. Brock in this case, with reference to the

payment of taxes. The court say that such evidence, to overcome the real title, should be clear and convincing, and that loose and uncertain testimony will not suffice, citing *Hurlbut v. Bradford*, 109 Ill. 397, adding, "this evidence utterly fails to come up to this standard." *Perry v. Burton*, 111 Ill. 138.

An action can not be maintained by the vendor of land for the purchase money, without first tendering a deed and making a demand, where he contracts to execute and deliver a deed thereof to the buyer upon the payment of the purchase money. *Kelly v. Mack*, 64 Cal. 303.

Where a purchaser agrees to pay for lots in a certain way, and the seller agrees to convey the lots, the owner must tender the deeds before he can demand payment. *Guerdon v. Corbett*, 87 Ill. 272.

Where, by agreement, the conveyance of real estate was to precede the payment of the purchase money, and the grantor gave a deed which so imperfectly described the land as to convey no title, *held*, that no action would lie for the money until a good deed had been tendered. *Overly v. Tipton*, 68 Ind. 410.

A party contracting to execute and deliver a deed is bound to prepare the deed if there be no agreement that it shall be prepared by the other party, and the vendor must tender it to the vendee before he can demand the purchase money. *Baston v. Clifford*, 68 Ill. 67; *Headley v. Shaw*, 39 Ill. 354.

Interest is not demandable on a land contract, while the purchaser is not in default. *Allen v. Atkinson*, 21 Mich. 351.

An action can not be maintained by the vendor of the land for the purchase money, without first tendering a deed and making a demand, where he contracts to execute and deliver a deed thereof to the buyer upon the payment of the purchase money. *Kelly v. Mack*, 45 Cal. 303.

Where a conveyance is to be made upon payment of the purchase money, the respective acts are dependent, and neither party can insist upon the performance of the thing stipulated to be done by the other without performance or an offer to perform upon his part. A mere allegation in the bill

of an offer and readiness to make a deed will not do. *Kimbrough v. Curtis*, 50 Miss. 117.

"The vendor, in an action against the vendee for the purchase money, must show that he has prepared and tendered a deed of conveyance, or has offered to prepare and tender such deed, or has been discharged or excused from preparing and tendering it by the acts or conduct of the vendee." 1 Chitty on Contracts, II, Am. Ed., p. 425. Notes and authorities there cited.

Laches in seeking relief under a contract of sale will preclude the relief. *Fitch v. Willard*, 73 Ill. 92.

The question was decided in the case of *Burger et al. v. Potter et al.*, 32 Ill. 70. There Lemuel Burger agreed to convey to Ephraim Potter certain land for a stipulated price, and then died before making a conveyance and before the purchase money was paid in full, leaving minor heirs. The executors and his heirs, including the minors by their next friend, brought suit against the purchaser to vest the title in the latter and to enforce the payment of the purchase money. The court made a decree accordingly. The Supreme Court held, that a court of equity had jurisdiction of this kind of a suit, but reversed this case, because relief had been granted not warranted by the allegations in the bill. *Burger v. Potter*, 32 Ill. 66. But in this case the statute of limitations had commenced to run in the lifetime of Piggott, and his death did not arrest it. Under the contract of sale it was his duty to ascertain the quantity of ground sold and to tender a deed.

A party may not plead his own neglect of duty as a ground for avoiding the limitation. *Furlong v. Riley*, 103 Ill. 628.

"Where a statute of limitations begins to run, it will continue to run until it operates as a complete bar, unless there is some saving or qualification in the statute itself." *Bonney v. Stoughton*, 122 Ill. 542; *Wood on Limitations*, 10.

Where the statute begins to run against the ancestor, it is not suspended by any statutory disability in the heir at the time of the descent cast. *Rogers v. Brown*, 61 Mo. 187; *Swearington v. Robertson*, 39 Wis. 462.

The statute applies only to disabilities existing when the

right accrues; after-accruing disability will not stop its operation. Ward on Limitations, 12.

The statute had been running against this claim about nine years when Piggott died in 1874. He would have been barred at law in 1885, when this suit was commenced, had he been living. It follows that his heirs are barred in equity.

“Where a party, with full knowledge of all the facts, sleeps upon his rights for nineteen years without asserting his equities, and no sufficient excuse is shown for the delay, his *laches* will be such as to present a bar to relief in a court of equity. A court of equity will not enforce a stale demand.” Castner v. Walrod, 83 Ill. 171. To similar effect: Walker v. Ray, 111 Ill. 315; Harris v. McIntyre, 118 Ill. 275.

“It is the settled doctrine of this court, that a party can not make one case by his pleading, and another and different case by his proofs.” McKay v. Bissett, 5 Gilm. 499; Morgan v. Smith, 11 Ill. 194; Rowan v. Bowles, 21 Ill. 16; Burger v. Potter, 32 Ill. 66; Randolph v. Onstott, 58 Ill. 52; Munn v. Burges, 70 Ill. 604; Heath v. Hall, 60 Ill. 350.

Messrs. KOERNER & HORNER, for appellees.

The appellants' counsel cites a number of authorities to show that a contract to sell and convey real estate can only be performed by giving a deed that will vest a good title, and which is a deed of warranty.

We are not disposed to question this contention. As for the deeds tendered the heirs in 1885, the point made has no foundation in fact, as they were warranty deeds. As to the deed tendered by Piggott in 1872, all objections were waived, except those indorsed by Bowman on the deed. While the mere taking possession of the land under an executory contract to convey, may not amount to a waiver of any objection to the title, unless accompanied with acts or expressions showing satisfaction, yet when, after possession is taken and a deed tendered by complainants, as it was in this case, and there is no objection to either the form or substance of the deed, but only as to the price to be paid, it can surely not be contended that the question of title or quantity conveyed is not waived.

The appellants' counsel incumbered the pages of the record quite unnecessarily with authorities to show that Piggott's tax title was not a good title. We ought to have been supposed to know that. We did not set up the tax title and never pretended in our arguments below or in our former briefs, that he had a good tax title; and, furthermore, what would have availed it under the proviso of the contract, which stipulated that for land held by Piggott by tax title *only*, a nominal price should be paid? He had title by possession, and not a tax title only. As long as Griswold and Bowman had no deed for the land, they were as his vendees in possession under him, so that when the deeds were tendered, there was a possession of thirty-seven years in Piggott and his heirs. It was said that the title to the land was in dispute. There was a question raised after the deed was made for survey 116. Griswold and Bowman contended that 116, bought of Piggott, extended farther south. Boismenu, owner of 115, had fenced up to what he contended was his northern line. Piggott had nothing to do with that case. Griswold, to whom the deed had been made on Bowman's request, sued Boismenu in ejectment in 1874, after Piggott was dead, and finally succeeded in adding several rods to the land purchased by them in 1865. It was not a question of title at all, but only as to the proper boundary.

Suppose there had been *laches* on our side, it, as has been proved, had been waived. If it is said that there is no allegation of any waiver in our bill, we answer that it is impossible to anticipate all the different lines of defense that might be made. The case was in court for four years before the defendants amended their answers, setting up *laches*. Special replications are not allowed in chancery cases, otherwise we could have replied the waiver. But who caused the delay after the survey was made? The bill alleges that owing to the minority of one of the heirs, who only had come of age a year before the bill was filed, a deed could not be made by all the heirs, although those of age had often offered to make a deed for their respective shares to the said Griswold and Bowman, which offer was not accepted by said defendants.

Now what is the testimony on that point? Brock testifies:

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"Some time after the memorandum of 1880, made by Mr. Bowman, we made a deed out for my wife and Mrs. Lane, two of the heirs, and presented it to Bowman, and he said he did not want a deed unless he got a deed for the whole from all parties. This deed was dated September 20, 1883. It will be seen then that as late as 1883 he made no objection as to the title. His principal objection seemed to be that he wanted a deed from all the parties; he would not pay unless he had all of them. Some of the other heirs made a deed, and I don't know but they went and acknowledged it, but it was never presented to him. I did tell the heirs that he would not take a deed unless all would sign it. I remember that we made a demand upon Mr. Bowman for a settlement or a payment of the money as many as a dozen times, and he kept putting us off. I knew that Mr. Piggott run after him ten years previous to his death as often as a dozen times a year, trying to get a settlement of the estate, but Bowman put him off."

It is said that the heirs might have made a deed and compelled payment of the money, although one or more of the heirs were not of age. Without stopping to say anything on this point, we would remark that most certainly could the defendants have filed a bill for the specific performance, although there was a minor in the case. If complainants could be held guilty of *laches*, the defendants surely are equally guilty. But we repeat, all this was waived. Bowman did not tell counsel for complainants, when the deeds were tendered him in 1885, that it was too late to tender the deeds, but told him Mr. Thomas should examine them.

PHILLIPS, J. The appellees filed their bill in chancery averring that Isaac N. Piggott on the 16th day of January, A. D. 1865, was the owner of certain lands in the bill described, which, with other lands owned by him, he on that day contracted to sell to W. D. Griswold and John B. Bowman. By that contract in writing Piggott sold all of lots 116 and 117 of the common fields of Cahokia in St. Clair County to him belonging and situated southwestwardly from the town of

Illinoistown, and what is known as Piggott's addition to same, excepting therefrom not exceeding three acres adjoining the said addition, and also two acres bargained and sold to one John Atton. A part of this land was to be paid for at the rate of \$75 per acre, and a part to be paid for at \$50 per acre. By the terms of the agreement the land was to be paid for in cash on delivery of deed. The quantity of the ground thereby bargained and sold to be ascertained by the said Piggott at the cost of all the parties. The contract contains the further clause: "What part of the said land is held by Piggott only under tax title is to be included on the conveyance of the balance at a nominal price." By a further agreement between the parties to that contract, made on the 23d day of May, 1866, Piggott was to assign certain leases on the payment of the purchase money, and a certain part of survey 116 was excepted from the contract. On the same day the last mentioned agreement was made, a further agreement was made by which it appears that on that day a payment was made to Piggott of \$7,025, and at the request of Bowman a deed, conveying to W. D. Griswold 113.10 acres of land of survey 116, was made and delivered by Piggott. That agreement contains this further clause: "The delivery of such deed shall not be construed as a consummation of said bargain, and shall be expressed in the document above referred to as executed on the 16th of January, 1865, but the said Bowman and Griswold or their legal representatives shall be entitled to any other deed necessary by me to be made, to convey to them under the conditions of said document all the land they are entitled to by the terms thereof." On the execution of the agreement of January 16, 1865, Griswold and Bowman took possession of the land in the agreement mentioned, and have since been in possession. The land in survey 117 not having been conveyed, the purchasers paid \$100 thereon. On the 10th day of June, 1866, Piggott tendered a deed from himself and wife to John B. Bowman, conveying fifty-three acres in survey 117 to W. D. Griswold, on which deed Bowman indorsed his reasons for refusing to accept the same, which were that the deed conveyed more land than the grantee owned or possessed,

or delivered possession of, or could convey and give possession of. On the 11th of February, 1874, Piggott died intestate, leaving as heirs at law the complainants, among whom was Dexter C. Slaten, who was a minor, who did not become of age until within a short time prior to filing the bill in this cause. The evidence shows, that on the 11th day of April, 1885, G. Koerner, as attorney for complainants, tendered two deeds, one signed by Mary Jane Brock, Robert F. Brock and Asenath P. Lane, of date February 16, 1885, the other signed by Christopher J. Slaten, Allen M. Slaten, Dexter C. Slaten, Cornelia R. Allemang, Thaddeus A. Slaten, Dwight D. Slaten, John W. Slaten, Elisabeth P. Slaten, Adeline Slaten, Eva M. Slaten, Milford Allemang, Victoria Slaten, and George M. Slaten, which deeds convey to W. D. Griswold and John B. Bowman 25.743 acres of land in survey No. 117, and these deeds were by Bowman required to be delivered to C. W. Thomas, who was attorney for Bowman, for examination, and his action thereon in accepting. When the deeds were so tendered to Thomas, as attorney for Bowman, he offered to pay a nominal consideration for the 25.743 acres, and made no specific objection to the deeds in any manner. On the 16th day of April, 1885, this bill was filed asking that the purchase money, with interest, should be paid, or that an account be taken of rents and profits derived from the land, and the original purchase money with the rents and profits, should be paid. Answers were filed by Bowman and Griswold, and subsequently a suggestion of the death of John B. Bowman was made, showing his personal representatives and heirs, and they being brought into court filed their answer. From the amended answer of Griswold, he ratifies the agreement made by Bowman for Griswold and Bowman; that it is not necessary to consider his testimony concerning a denial of any authority on the part of Bowman to make the contract.

No question is made as to the correctness of the survey or the quantity of land described in the deed, but it is insisted that no deeds were tendered to Griswold, and that the plaintiff had no title to the lands in survey 117, unless a tax title, and that for that only, a nominal price was to be paid.

The court entered a decree for complainants for the purchase money, with interest, and decreed the payment of \$2,984.50, and upon payment of the same, the title should vest in the grantees in the deed, and in default of such payment, the master in chancery should sell the land in survey 117 as described on the bill, and from the proceeds pay to complainants the amount found due. The evidence shows that Bowman entered into the contract with Piggott in behalf of himself and Griswold and the making of the contract and all negotiations with reference to that contract and with reference to the execution of the deeds so far as Bowman and Griswold were concerned, was the act of Bowman. From the answer of Griswold it is shown he ratified the contract so made. That ratification of the contract was an approval of the acts of Bowman, and as he had been the active partner in reference to the entire matter, so far as he and Griswold were concerned, the tender of the deed to him was a compliance with the contract on the part of the heirs. When these deeds were so tendered, Bowman directed they should be submitted to his attorney, C. W. Thomas, for his examination, and when so submitted, no objection was made as to the form of the deed. But he pronounced the deed all right and proposed to pay a nominal price for the land. The payment of a nominal price was refused. It is now urged that the deeds are quit claim deeds, and that defendants are not bound to accept any other than warranty deeds under the contract. The deeds recite the agreement and convey all the interests the heirs of Piggott have in the premises and covenant against any acts of theirs to in any manner affect or incumber the title. Had an objection existed as to the form of the deeds at the time they were tendered and examined and stated to be all right, it was the duty of defendants to state that objection. *Corbus v. Teed*, 69 Ill. 205.

At the time of the execution of the contract of sale and for some years thereafter the quantity of land in survey No. 117 could not be determined, as there were conflicting claims with reference to a part of that survey, and litigation grew out of such conflicting claims, the several suits were determined

and the amount of land mentioned in the deeds was found to be in Griswold and Bowman, who entered into possession under their contract of purchase from Piggott. It is insisted by the defendants that the complainants are guilty of *laches* in not sooner bringing their suit for performance. The evidence shows that shortly after the settlement of that litigation prior to determining the amount of land to be conveyed, one of the complainants was yet a minor, and when he came of age the deed was tendered, and shortly thereafter this bill filed. During all the time from the making of the contract, the vendees were in possession enjoying the rents and profits, and there was not such *laches* on the part of the complainants as to bar their action. It is urged, further, by the terms of the contract this land was to be paid for at the nominal price, as it is insisted that Piggott had no title other than a tax title.

By the contract of sale the vendees are to pay the vendor "for all of said lands so bargained and sold, and lying northwestwardly of the county road across said survey leading from Cahokia to Papstown, \$75 per acre, and for all of said land lying southeastwardly of said road \$50 per acre."

The plat of survey offered in evidence with the other testimony shows the quantity of land lying northwestwardly of said road to be 16.11 acres, and lying southeastwardly to be 9.63 acres. By a memorandum shown to have been made by Bowman, the 23d of January, 1880, his calculation made the quantity substantially the same, and that southeast of said road he calculated at \$50 per acre. That memorandum, taking into consideration the contract, the quantity of land and the location, leaves the conviction that Bowman calculated this land as sold under the contract. It further appears that he was conversant with the title Piggott had to the land. We are satisfied his intention at the time of the execution of the contract of sale was to include the lands in the contract at the price then mentioned, and the court found correctly, from the evidence, that the lands in controversy were sold at the price as found by the court. The question as to what title Piggott had to the land is of more serious difficulty if it became necessary to determine that question, but as we view the facts in

this record, it is not necessary for us to determine that question. As we have seen, the contract was to pay the price for the land as found by the court. The vendees were let into immediate possession of the land. The rents and profits of the land for about twenty years was about six dollars per acre, and that has accrued to the vendees. There has been litigation in reference to title and possession of parts of the land which has been adjudicated in favor of the vendees. Whatever interest they have in the land they acquired by virtue of their contract with Piggott. They have paid only \$100 on a tract of land, which, as correctly found by the court, was to be paid for at the price of \$1,689.75. The taxes with interest thereon as paid by these complainants since the vendees have been in possession, amount to \$660.21. The interest on the value of the land from the time the deeds were tendered amounts to \$448.25. These sums, less the \$100 paid at the time of the delivery of the deed to survey 116 is the total of this sum decreed to be paid. The vendees make no offer to deliver possession back to the heirs of the vendor, but seek to hold the same by reason of the clause in the contract that "What part of the said land is held by Piggott only under a tax title, is to be included in the conveyance of the balance at a nominal price."

If Bowman knew the condition of the title that Piggott had in this land, and entered into the contract that he did, it was a contract to pay a specified price for the land, and from all his conduct, from the manner in which he made the memorandum as to its value, we are satisfied that he treated this land as being specially contracted for at \$50 and \$75 per acre, and he to take whatever title Piggott had. He contracted to sell to them and they entered under the contract. That title was good enough to defeat the several suits brought to test the right to the possession of the land. It was a sufficient title for them to hold the land under for a term of more than twenty years, from the execution of the contract on the 16th of January, 1865, to the tender of the deeds on the 11th of April, 1885. That without determining the character of title Piggott held under the contract of purchase, it was to be

People v. Smith.

paid for at the prices of \$50 and \$75 per acre, and the deed to convey such title as Piggott held. Nor was it error to decree interest on the value of the land not paid for from the time of the tender of the deeds. After the execution of the deeds and their tender, complainants, or their ancestors, were not in default, and from that time interest was properly decreed to be paid. The decree is affirmed.

Decree affirmed.

THE PEOPLE OF THE STATE OF ILLINOIS

V.

HARRY SMITH ET AL.

Practice—Forfeiture of Recognizance—Payment of Costs.

1. A mere offer, in a given case, to pay the costs of a recognizance, is not a literal compliance with the statute providing that a forfeiture thereof shall not be set aside until such costs are paid, and until actually paid, sureties who have caused the arrest and return of an absconding defendant, are not entitled to an order setting aside such forfeiture.

[Opinion filed March 3, 1892.]

APPEAL from the Circuit Court of Fayette County; the Hon. J. J. PHILLIPS, Judge, presiding.

Mr. J. M. ALBERT, State's Attorney, for appellant.

Messrs. FARMER, BROWN & TURNER, for appellees.

SAMPLE, J. The defendant, Harry Smith, on the 23d day of October, 1889, entered into a recognizance before a justice of the peace, in the sum of \$500, with the other defendants as sureties, for his appearance on the first day of the February term, 1890, of the Circuit Court of Fayette County, to answer to a charge of an assault with a deadly weapon with intent to inflict a bodily injury, at which term of the Circuit Court he

was indicted by the grand jury. The recognizance was duly certified to by the said court, and the said defendant not appearing at said term, the recognizance was declared forfeited, and *scire facias* awarded. Instead of proceeding by *scire facias* to prosecute the forfeiture to final judgment, the State's attorney brought an action of debt to the September term, 1890, of said court. Afterward, at said term, the sureties filed their motion to set aside said judgment of forfeiture theretofore entered at the February term, and in support thereof, filed the affidavit of John Ging, one of the sureties, to the effect that their principal, Harry Smith, after entering into said recognizance had, without the knowledge, consent, or procurement of his sureties, fled from the State of Illinois, and did not appear at said February term to answer said charge or indictment, which indictment was still pending on the docket for trial; that the sureties had, at great expense to themselves, caused him to be arrested in the State of Missouri, whither he had fled, and returned to Fayette County, where he then was, at the time of this motion, confined in jail, ready to be produced to answer to said indictment, and hence pray that said judgment of forfeiture be set aside and the sureties discharged.

Thereupon the court sustained said motion, and set aside said judgment of forfeiture, to which action of the court the people, by the State's Attorney, excepted, and thereafter, at the same term of court, the State's Attorney moved the court to vacate the order setting aside the judgment of forfeiture, which motion was overruled and exceptions taken. This appeal calls in question the action of the court as above stated. The order of the court was that "the judgment of forfeiture of the recognizance of said Harry Smith and his sureties * * * be set aside, and the same is hereby set aside and vacated *upon the payment of costs of forfeiture* by defendant Harry Smith, or his sureties." The record filed in this case does not show that the costs were paid by either of the defendants or any other person. In this record the order setting aside the judgment of forfeiture was conditional upon the payment of the costs of the forfeiture, which was not com-

plied with. The concluding proviso of Par. 369, page 837, Starr & C. Ill. Stats. is: "That no such forfeiture of a recognizance shall be set aside *until* the accused shall pay the costs of such recognizance." The order, as entered, was intended to be in compliance with this provision of law, and contemplated the payment of the costs contemporaneously with the entry of the order. A mere offer to pay the costs is not a literal compliance with this provision of the statute, and until actually paid, the appellees were not in a position to legally entitle them to have the order entered. *Gallagher v. The People*, 88 Ill. 335. But the order being entered conditionally on the payment of costs, as is the usual practice, neither by its terms nor the law, did it have any vitality imparted to it until that condition was complied with. By analogy, it would appear that the order was in effect like one setting aside a judgment in ejectment and granting a new trial under the statute on the payment of costs. The right in such a case to a new trial depends upon the payment of costs, and though an order is entered setting aside the judgment in ejectment and granting a new trial under the statute, yet, if the costs are not paid within the time provided by law, no vitality is imparted to the order, and the court may set it aside and strike the case from the docket. *Setzke v. Setzke*, 121 Ill. 30. And the record itself should disclose such payment if made. *Ibid*. The order is entered in such cases as a matter of course when the application is made under the statute, and all the court has to do thereafter, is to see that the precedent conditions of the payment of the costs is performed. *Emmons v. Bishop*, 14 Ill. 152. The payment of the costs not having been made, so far as disclosed by this record, the court erred in not sustaining the motion on the part of the people to vacate said order setting aside said judgment of forfeiture; the proceeding was statutory, and the statute heretofore referred to expressly provides that no judgment of forfeiture shall be set aside *until* the costs of the recognizance are paid. Doubtless the attention of the court below was not called to the fact that the costs had not been paid, as the point is not made in the

argument of appellant. For the error stated, this case will be reversed.

Judgment reversed.

Judge PHILLIPS took no part in the consideration or decision of this case.

LOUISVILLE & NASHVILLE RAILROAD COMPANY

V.

SYLVESTER A. SHELTON.

Railroads—Negligence—Defective Fence and Gate—Farm Crossing—Contributory Negligence.

1. The question of contributory negligence in a given case is for the jury.

2. In an action brought to recover from a railroad company for injuries to a horse, alleged to have occurred through its negligence, this court holds that the jury were justified by the evidence in finding defendant guilty of wilful negligence in permitting the gate to remain insecure and unfit for the use it was put to, for the length of time it was maintained in that condition after notice.

3. In such case it is a question of fact for the jury to determine from the evidence, whether a given fence was so negligently and improperly constructed and maintained as to be more dangerous to stock not breachy or unruly than it would have been if reasonable care had been used in building and maintaining it, and whether or not these acts of negligence were the proximate causes of the injury.

4. A railroad company, irrespective of a statute, may erect fences inclosing its right of way, and construct gates at farm crossings, but in the exercise of such rights it must so act as not to negligently injure another; failing in this regard it must respond in damages for injuries arising from such failure.

5. It need not be certain that at the time the act is done the damages will ensue.

[Opinion filed April 4, 1892.]

APPEAL from the Circuit Court of Hamilton County; the Hon. C. C. BOGGS, Judge, presiding.

L. & N. R. R. Co. v. Shelton.

Mr. J. M. HAMILL, for appellant.

Mr. JOHN C. EDWARDS, for appellee.

GREEN, P. J. This suit was brought by appellee in a justice court to recover the value of a mare, whose death, he alleged, resulted from the negligence of appellant in maintaining a gate in a defective condition at a farm crossing, and a barbed wire fence inclosing its right of way on the opposite side of its track, defectively constructed, in bad repair, and dangerous to stock not breachy or unruly. Appellant took an appeal from the judgment against it in the justice's court, and the cause was tried in the Circuit Court, where a verdict and judgment for \$115 damages and costs was rendered in favor of appellee, to reverse which judgment, appellant took an appeal to this court. It appears by the evidence, that the mare got out of appellee's pasture, adjoining said right of way, through the space that should have been closed by the gate, crossed the track and seeing some horses in an adjacent field, attempted to join them by jumping over said wire fence, and in doing so, struck the top wire which gave way, pulling out the staples which held the wire to the posts. The mare was thus caught between this loose wire and the wire below, and in struggling to extricate herself, her fore leg was cut through at the joint below the shoulder by the barbed wire, and she was otherwise injured and death resulted. The evidence clearly shows that the gate could not be fastened and was utterly defective, and that for a long time before the injury, appellant's servants having charge thereof knew its condition and the necessity to repair it in order that it could be securely closed and fastened, and thus prevent animals from getting out of plaintiff's pasture into the right of way. The proof also established the following facts: that plaintiff's mare was not breachy or unruly; that the wire fence was less than three feet, eight inches high; that the posts were a rod apart, and when the animal struck the top wire, the staples gave way from at least four posts, thus loosening the wire, causing it to drop and catch the animal between it and the other wires. In

some places this top wire was drawn up tight, and in others it was not. On behalf of appellant, it is claimed no liability under the statute was shown by the proof, because the animal was not injured by an engine or train of appellant, nor by the wilful negligence of those in charge of an engine or train, and that at common law appellant is not liable, because, under the common law it was not required to inclose its right of way against animals, and because appellee was guilty of such contributory negligence in permitting the mare to graze in the pasture with the gate defective and insecure, as bars his right to recover. Conceding that the proof failed to establish a liability under the statute against appellant to respond in damages for the injury alleged, we are unable to reach the conclusion that appellant is not liable at common law for the injury and damages resulting from the acts of negligence proven. The jury were justified by the evidence in finding appellant guilty of wilful negligence in permitting the gate to remain insecure, and unfit for the use it was put to, for the length of time it was maintained in that condition after notice. It was also a question of fact for the jury to determine from the evidence whether or not the barbed wire fence was so negligently and improperly constructed and maintained as to be more dangerous to stock not breachy or unruly, than it would have been if reasonable care had been used in building and maintaining it, and whether or not these acts of negligence were the proximate causes of the injury. If the jury found in the affirmative upon these questions, and there is evidence in the record supporting such finding, the verdict and the judgment were right. We have examined *Headen v. Rust*, 39 Ill. 186, *Great Western R. R. Co. v. Morthland*, 30 Ill. 451, and *I. C. R. R. Co. v. Phelps*, 29 Ill. 447, cited on behalf of appellant in support of its contention that appellee had no right to recover at common law, and do not think the rulings in these cases conflict with our views as above expressed. Appellant could lawfully erect fences inclosing its right of way, and construct gates at farm crossings, but in the exercise of this right it must so act as not to negligently injure another. *Wharton on Negligence*, Sec. 787, *et seq.*

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It need not be *certain* that at the time the act is done the damages will ensue. If one remove or destroy a fence inclosing a field or opens a gap in it, it is possible that animals confined therein may not escape so as to encounter a danger outside. Opening the fence does not cause an animal to pass through it, it offers the opportunity. Opening the fence, according to circumstances, exposes to injury property within, or property outside, or both. It is in this manner that the primary and efficient cause generally produces consequential damages. Sutherland on Damages, 47; Gould v. B. & S. P. R. R. Co., 82 Me. 122. Applying the rules and principle laid down in the foregoing citations, the facts disclosed in the record impel us to the conclusion that appellant's liability was clearly established and the judgment right. The question of contributory negligence on the part of appellee was for the jury, and we think the evidence justified the finding that he was not guilty of such negligence. The jury were not misdirected or misled to the injury of appellant by the instructions given, and we perceive no error requiring the judgment to be reversed. It is thereupon affirmed.

Judgment affirmed.

HUGH LAMBERT AND DUFF LAMBERT
v.
THE PEOPLE OF THE STATE OF ILLINOIS.

Practice—Replevin of Fee Bills—Sec. 27, Chap. 33, R. S.—Sec. 574, Criminal Code.

1. The method provided for by Sec. 574 of the Criminal Code, for procuring a discharge from imprisonment, or for preventing the defendant, who may be convicted of a misdemeanor, punishable by fine only, from being imprisoned, is purely statutory and unknown to the common law.

2. The best form of practice to be adopted under that section is to determine the amount of fine and of costs, and enter appearance and confess judgment, so much fine and so much costs, together with costs to thereafter

accrue. No particular form of judgment is necessary if the record contains sufficient to show the amount for which execution is to issue.

3. When a conviction is had and the judgment entered for fine and costs, it appearing in the same judgment and record that the defendant so convicted, being desirous of replevying the fee bill and fine, with persons named, confessed a judgment in favor of the people, and the costs are taxed in a fee bill, the judgment will show the amount of fine, and the fee bill will show the amount of costs, and the costs in such case are determined by the fee bill; and where a defendant procures his discharge or prevents his imprisonment by reason of a confession of judgment for the amount of fine and costs by himself and his sureties, he is estopped from questioning the amount of the fine or costs.

4. No appeal or writ of error could be prosecuted from the judgment of conviction, for the reason that the judgment by confession would be a release or waiver of error, and the costs are as integral a part of that judgment of confession, as would be the fine assessed on the judgment of conviction.

5. Where, in such case, an execution issues after the lapse of five months for the amount shown by the record for the fine, and the amount shown by the fee bill for the costs, the court may not, on a motion to retax fee bill, or a motion to quash the fee bill entered on the judgment of conviction, either retax costs or quash the fee bill, and even if entertained, such action can not affect the judgment.

[Opinion filed April 4, 1892.]

APPEAL from the County Court of Pope County; the Hon. GEORGE A. CROW, Judge, presiding.

Mr. W. S. MORRIS, for appellants.

Mr. D. G. THOMPSON, State's Attorney, for appellees.

Per Curiam. Appellants were indicted in the Circuit Court of Pope County for riot, and the indictment was certified to the County Court for trial. From a verdict and judgment of guilty and a fine assessed in that court, the defendant appealed to the Appellate Court of the Fourth District, where the judgment was reversed because of error in instructions, and remanded. The defendants after proper notice were again placed on trial, and a verdict of guilty was found against two of the three, and the third defendant discharged. A motion for a new trial as to the defendants found guilty, was entered, which was overruled by the court, and a judgment was entered

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on the verdict, and a fine assessed against said defendants. Thereupon the defendants against whom the judgment was entered, filed their motion for a rule against the clerk of the County Court of Pope County to tax costs and make out fee bill in the proceeding on which defendants were convicted; which, being done, the defendants so found guilty entered their motion to quash the fee bill in that proceeding, which was sustained, and it was adjudged by the court that the defendants so convicted pay all costs except those made by Kirt Lambert and Thomas J. Lambert, one of whom had been found not guilty on the first, and the other discharged on the second trial. The defendants Hugh Lambert and Duff Lambert were, by this judgment, adjudged guilty, and a fine of \$5 assessed against each, and it was further adjudged that they should pay all costs except those made by and on behalf of Kirt Lambert and Thomas J. Lambert. From that judgment there was no appeal, and the same stands unreversed.

In the same judgment and record it further appears that "being desirous of replevying the fee bill and fine herein," the defendants so convicted, together with George W. Lambert and John D. Choat, confessed a judgment in favor of the people of the State of Illinois, if default be made in the payment of the said fine and costs within five months, and it was further adjudged that in case of such default execution should issue, and the defendants were discharged. After the expiration of more than five months from the rendition of such judgment and such proceedings in and about the replevying of such fine and costs, there being default in payment of the same, an execution issued against Hugh Lambert, Duff Lambert, George W. Lambert and John D. Choat for \$10 fines and \$352.15 costs. From fee bills appearing in the record which purport to show the costs so adjudged, the amount of the fee bills are \$352.15. The execution so issued, and the fee bills so showing the costs, were placed in the hands of the sheriff of Pope County. No warrant for the collection of the fee bills by way of execution is thereto attached; but the total amount is in the execution, and the defendants in execution paid \$10 as the fines so assessed, and filed what they term

a replevin bond, which recites that two fee bills, a plaintiff's fee bill for \$193.80, and a defendant's fee bill for \$158.35, were issued against the defendants therein named, directing the same to be levied, etc., and being desirous of replevying said fee bills, tender the bond to the sheriff conditioned for the payment of the fee bills if they be not quashed. The defendants appeared before the county judge at a subsequent term of the County Court, and such proceedings were had that it was adjudged by that court that certain items in such fee bills were improperly taxed, and that such items should be stricken from the same, and that all other items should remain as thus taxed. From that judgment the defendants in execution prosecute this appeal, and assign as error the failing to strike from the fee bills certain items, and the State's attorney assigns cross-errors in striking from the bills the items stricken. By Sec. 574, Criminal Code of Illinois, Starr & C. Ill. Stats., it is provided:

"If the person convicted, together with one or more sufficient sureties, will acknowledge a judgment in favor of the people of the State of Illinois for the amount of the fine, or the costs only, when no fine is imposed, the court shall cause the same to be entered in full satisfaction of the fine and costs, or costs only, with a direction that if the judgment is not paid within five months from the time of entering the same, execution shall be issued thereon, and the defendant shall, upon the entering of such judgment, be discharged from imprisonment on account of such fine or costs."

This method of procuring a discharge from imprisonment, or of preventing the defendant who may be convicted of a misdemeanor, punishable by fine only, from being imprisoned, is purely statutory, and unknown to the common law. No particular form of entering a judgment is prescribed by the statute. We are of opinion that the best form of practice to be adopted under that section of the statute would be to determine the amount of fine, and the amount of costs, and enter appearance and confess judgment, so much fine and so much costs, together with costs to thereafter accrue. But no particular form of judgment is necessary if the record con-

tains sufficient to show the amount for which execution is to issue. When a conviction is had, and the judgment entered for fine and costs as here, as a judgment by confession in the same record of a judgment, and the costs are taxed in a fee bill, the judgment will show the amount of fine, and the fee bill will show the amount of costs, and the costs in such case are determinable in the same way as costs in any other case, that is, by the fee bill. But when a defendant procures his discharge or prevents his imprisonment by reason of a confession of judgment for the amount of fine and costs by himself and his sureties, he is estopped from questioning the amount of the fine or costs. He could no more, in the case of such judgment by confession, question the amount of costs for which he confessed judgment, than could he question the amount of fine. The judgment for fine, as entered on the conviction, as well as the costs taxed at the time of judgment, are each conclusive, and are to the judgment by confession merely collateral. No appeal or writ of error could be prosecuted from the judgment of conviction, for the reason that the judgment by confession would be a release or waiver of errors, and the costs are as integral a part of that judgment of confession as would be the fine assessed on the judgment of conviction. As to the judgment by confession to so procure a discharge, the judgment of conviction, and the fee bill made up thereon, are merely collateral and aver the judgment by confession as entered. When the execution issued after the lapse of five months for the amount shown by the record for the fine, and the amount shown by the fee bills for the costs, there was no authority in the court, on a motion to retax fee bill, or a motion to quash the fee bill entered on the judgment of conviction, to either retax costs, or quash the fee bill, and even when entertained such action could not affect the judgment. At the time of the confession of the judgment the amount of the fine and costs were known, or should have been known by the defendants in execution. They can not be heard to contest the matter after having procured their discharge. It was error to retax the fee bill as affecting the execution in the case. The cross-errors are sustained. The court erred in overruling

appellee's motion to dismiss the proceeding. The judgment is reversed and the cause remanded.

Reversed and remanded

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LOUISVILLE, EVANSVILLE & ST. LOUIS CONSOLIDATED
RAILROAD COMPANY

V.

CROWN COAL COMPANY.

Railroads—Unjust Discrimination—Freight Rate—Chap. 114, R. S.

In an action brought to recover under the provisions of Chap. 114, R. S., prohibiting unjust discrimination in freight rates by carriers by rail, this court holds that the trial court properly held that defendant was guilty of unjust discrimination, as charged in the first count of the declaration, but that the amount of damages allowed was greater than the evidence warranted; and that it was not guilty under the second count, the rate therein referred to relating to another quality of coal, shipped in a different manner, it not appearing that plaintiff shipped any such coal, although another company did, at a rate which was less than that charged the plaintiff on a different quality of coal.

[Opinion filed April 4, 1892.]

APPEAL from the Circuit Court of St. Clair County; the Hon. B. H. CANBY, Judge, presiding.

The Crown Coal Company brought this suit in assumpsit against appellant to recover treble damages and attorney's fee under the provisions of Chap. 114, R. S., prohibiting unjust discrimination in the rates charged for the transportation of passengers and freight over railroads in this State. The declaration consisted of two counts. In the first count it is averred that on every day between April 1, 1889 and January 1, 1890, plaintiff, from its coal mine in Saint Clair County, Illinois, on a switch connecting with defendant's road, within said county and State, shipped upon defendant's road to the city of East

Saint Louis, in said county and State, a distance of ten miles, thirty-five thousand tons of coal. That defendant charged, collected and received from plaintiff for such transportation forty-five cents per ton, and charged, collected and received from the Consolidated Coal Company operating mines under similar circumstances and conditions, for transporting coal in like quantities from its mines to said city of East Saint Louis, over the same road, in the same direction, and for a greater distance than ten miles, the sum of thirty-seven and a half cents per ton, thus discriminating against plaintiff in the sum of seven and a half cents per ton, amounting in the aggregate for the period from April 1, 1889, to January 1, 1890, to the sum of \$2,635. The second count contains substantially the same amounts except that for the same period, from April 1, 1889, until January 1, 1890, it is charged plaintiff was compelled to pay forty-five cents per ton freight, while the Consolidated Coal Company paid but thirty-one and one-quarter cents per ton for the like service, the aggregate amount of such excess being \$4,812.50. To this declaration defendant pleaded the general issue. The cause was tried by the court, a finding and judgment for plaintiff was entered for \$3,911.26 damages and costs of suit, whereupon defendant took this appeal.

Messrs. G. & G. A. KOERNER, for appellant.

Mr. R. W. ROPIQUET, for appellee.

GREEN, P. J. The finding and judgment appealed from was entered in favor of plaintiff upon the cause of action set up in the first count of the declaration. This is apparent because of the amount charged in said count as unjust discrimination agreeing with the amount of judgment rendered. The alleged discrimination against plaintiff is seven and one-half cents per ton, the difference between a rate of forty-five cents per ton paid it by plaintiff and thirty-seven cents per ton paid it by the Consolidated Coal Company. The number of tons shipped by plaintiff over defendant's road during the period from

April 1, 1889, up to January 1, was 17,383.20 tons; at seven and one-half cents per ton, being the basis upon which the amount of unjust discrimination was fixed by the trial court, that amount would be within a fraction of \$1,303.76, and three times this sum, the treble damages allowed, would be \$3,911.26, the amount of said judgment. It appears from the evidence that during the period from *April 1, 1889, to July 1, 1889*, defendant charged, collected and received from the Consolidated Coal Company only thirty-seven and one-half cents per ton for transporting commercial coal from the mines of said company over its railroad to East Saint Louis, and charged, collected and received from appellee during the same period forty-five cents per ton for transporting the same class of freight over the same road, in the same direction and a less distance to the same destination. Thus a *prima facie* case is established of unjust discrimination inhibited by the statute against appellant of seven and one-half cents per ton "for that class of freight" transported during these three months at the lesser rate for the Consolidated Coal Company.

To rebut this *prima facie* case of unjust discrimination, evidence was introduced showing that the Consolidated Coal Company had made a contract to furnish commercial coal to certain parties for the year ending July 1, 1889, and in 1888, had notified defendant of this contract, and thereupon the latter agreed to transport the coal so to be furnished, at the rate of thirty-seven and one-half cents per ton from the mine to East Saint Louis, *until July 1, 1889*, and for this reason the thirty-seven and one-half cent rate was given, notwithstanding the fact that on *April 1, 1889*, defendant raised the rate for transporting the same class of freight over its road in the same direction, for the same or less distance, to the same destination.

But it was also shown by the evidence that ten days before April 1, 1889, defendant notified appellee the rate would be raised *on that date* to forty-five cents per ton, but that *bona fide* contracts for furnishing coal entered into while the old rate of thirty-seven and one-half cents was in force, would be protected. After receipt of this notice and on March 23,

1889, appellee filed with defendant a copy of a contract with the Western Coal and Towage Company, made on January 1, 1889, whereby appellee agreed to furnish, for one year, coal from its mine on defendant's road, to said company at East Saint Louis, and asked protection for this contract, but defendant refused to give appellee the benefit of the rate then in force. In view of all the evidence, the trial court properly held that appellant was guilty of unjust discrimination as charged in the first count of the declaration. *C. & A. R. R. Co. v. The People*, 67 Ill. 11; *C., B. & Q. R. R. Co. v. People*, 77 Ill. 443.

The amount of damages allowed, however, was greater than the evidence warranted. The averment in said first count is, that defendant charged, collected and received from the Consolidated Coal Company the lesser rate of thirty-seven and one-half cents per ton for the full period of nine months from April 1, 1889 to January 1, 1890. The evidence is that all the commercial coal transported by defendant for said coal company at thirty-seven and one-half cents per ton was that coal only, furnished under its contract expiring July 1, 1889, and carried during the months of April, May and June of that year, amounting to a quantity not exceeding six thousand tons. Hence there was an unjust discrimination of seven and one-half cents per ton upon that amount only, made against appellee by appellant, and upon that basis the damages should have been figured and assessed.

The court properly refused to find for appellee under the second count of said declaration. It appears from the evidence there were two classes of coal transported from mines on appellant's road to East Saint Louis. One was called commercial coal and was used by consumers generally. The other was called railroad coal, which was of inferior quality, the run of the mine, which was furnished to and used by railroads exclusively. For years before and up to the time this suit was commenced, a uniform rate of thirty-one and one-fourth cents per ton had been charged, collected and received by appellant for transporting this railroad coal from the mines on its road to East Saint Louis. It was shown by the evidence

why the difference in the rates was made for transporting these different classes of freight. The railroad coal is carried in the cars of the railroad companies to whom it is furnished, and not in the cars of appellee. There is a constant demand for this class of coal. It is mined and shipped during months that coal used by general consumers is not in much demand, hence more miners are employed and mines operated more extensively. These and other reasons that were given in evidence, sufficiently indicate the wisdom of encouraging the increased output of this class of coal from mines on appellant's road, by making a less rate for its transportation, and until further advised, we are not prepared to hold such action to be unjust discrimination. It is for collecting and receiving this rate of thirty-one and one-fourth cents per ton for this class of freight, that appellee seeks to recover under said second count. Holding as we do that it is not the same class of freight as that shipped over appellant's road by appellee, for which the rate of forty-five cents was charged and collected by appellant, it follows that unless the proof showed that appellee shipped coal of the same class of freight, viz., railroad coal, as that shipped by the Consolidated Coal Company, and paid the forty-five cent rate for its transportation, which the evidence shows it did not do, no unjust discrimination was made against it as charged in the second count of the declaration. This disposes of the three cross-errors assigned by appellee, except the error assigned for refusal of the court to admit evidence offered by plaintiff below, which is not well assigned, for the reason that the damages allowed were excessive under the evidence. The judgment is reversed and the cause remanded.

Reversed and remanded.

THE PHENIX INSURANCE COMPANY

V.

FRANK STILL.

43 233
79 373*Negotiable Instruments—Note—Insurance Premium.*

In an action brought by an insurance company to recover upon a note given for a premium, the defendant contending that the application misdescribed the location of the property insured, and that he had never received the policies, this court holds that the verdict for the defendant was against the law and the evidence, and that the same can not stand.

[Opinion filed April 4, 1892.]

APPEAL from the Circuit Court of Pope County; the Hon. O. A. HARKER, Judge, presiding.

Mr. W. S. MORRIS, for appellant.

Mr. THOMAS H. SHERIDAN, for appellee.

Per Curiam. This suit was brought upon a note given by the appellee for the premium on two insurance policies. The appellee interposed the defenses that the application for insurance misdescribed the location of his property in this, that it was described as being in town 14, instead of town 13, range 5, and that he had not received the policies of insurance. On the trial below, before a jury, a verdict was rendered in favor of appellee, which was sustained by the court, and judgment entered on the verdict, from which this appeal was taken, and the error assigned is, that the verdict and judgment were contrary to the law and the evidence. It appears from the evidence that at the time appellee signed the note in suit, he also signed the application for insurance and looked it over, but made no objection as to the misdescription of the location of his property. He told the agent that he wanted the insurance on the property that he owned, and doubtless furnished the description that was written in the application. It further appears that the application was

approved and the policies were issued thereon which were inclosed in an envelope properly addressed and mailed to the appellee. If he did not get them, he never notified the company or its agent of that fact although he was notified sixty days before, and thirty days after the note was due, to pay it. The company could not hold his note and at the same time claim that his property was not insured. Had his property burned or been destroyed by the elements, against the danger of which he had obtained insurance, he could have recovered his loss from the company to the extent of his insurance. If the appellee's property was insured, then it follows that the consideration of the note had not failed. The court below so in effect instructed the jury. The verdict is manifestly against the law and the evidence, and a new trial should have been awarded. Judgment is reversed and the cause remanded.

Reversed and remanded.

ST. LOUIS, ALTON & TERRE HAUTE RAILROAD COMPANY

V.

CHARLES H. GOODALL.

Practice—Placita—Necessity Therefor.

The judgment is reversed in the case presented, the record containing no placita or convening order of court, it not appearing before what judge the cause was tried, or whether it was heard before the judge who signed the bill of exceptions. It is not the office of the bill of exceptions to supply any part of the record proper.

[Opinion filed April 4, 1892.]

APPEAL from the Circuit Court of Williamson County; the Hon. JOSEPH P. ROBERTS, Judge, presiding.

Messrs. CLEMENS & WARDER, for appellant.

Mr. SAM. H. GOODALL, for appellee.

Abt v. Weyand.

Per Curiam. The record in this case contains no *placita* or convening order of court. It does not appear from anything in it before what judge the cause was tried or whether it was in fact heard before the judge who signs the bill of exceptions. It is not the office of the bill of exceptions to supply any part of the record proper. The judgment must be reversed. The reason why the judgment is not valid is because it does not appear that there was the proper organization of a court by which a lawful judgment could be rendered. *Planing Mill Lumber Co. v. The City of Chicago*, 56 Ill. 304; *Keller v. Brickey*, 63 Ill. 496.

The judgment is reversed and the cause remanded.

Reversed and remanded.

PAUL W. ABT ET AL.

V.

JOHN WEYAND.

Sales.

In an action brought to recover for certain brick sold, there being a contention as to the price thereof, this court declines, in view of the evidence, to interfere with the judgment for the defendant.

[Opinion filed June 21, 1892.]

APPEAL from the Circuit Court of St. Clair County; the Hon. B. R. BURROUGHS, Judge, presiding.

Messrs. TURNER & HOLDER, for appellants.

Messrs. ALEXANDER FLANNIGEN and E. R. DAVIS, for appellee.

SAMPLE, J. The appellants brought this suit to recover the value of some fire brick which had been used to build coke ovens, in an endeavor, under a patent process, to make

coke out of coal slack. The process was a failure and the fire brick were put on the market for sale. The appellants also had some second-hand red bricks for sale at the same place at \$4 per thousand. One Voss was in charge of the business of the sale of the brick, and had advertised that persons desiring to purchase brick should go to Paul W. Abt, or come and see him at the works. The appellee wanted some brick and saw Mr. Abt in regard to it, who referred him to Lorington, one of the partners, who gave appellee an order on Voss for what brick was wanted; the order did not specify the price. The appellee obtained thirty-three loads of fire brick and twelve hundred second-hand red brick. For the latter, appellee paid at the rate of \$4 per thousand. The point of dispute is as to the price of the fire brick, the appellant contending that it was agreed that they should be paid for at the same price as the red brick, but as they were irregular in shape and size, that the amount should be determined by measurement in the wall, which made, in space, what would be equal to fifty thousand brick. The appellee contends that he was to pay for the fire brick by the load at the price of seventy-five cents per load, which amount he had paid before this suit was begun. The case was submitted to a jury which found for the appellee. The only error that is assigned is, that the verdict and judgment is clearly against the weight of the evidence. There is a sharp conflict in the evidence in this case. However, there is no dispute but that Lorington gave the appellee a written order for brick which was delivered by him to the manager, Voss; that written order is not produced, and the evidence does not definitely disclose whether it was for fire brick or second-hand red brick. It is clear, however, that it fixed no price to be paid for the brick to be obtained under it; Lorington, who was alone with Weyand, claims that he told him that the fire brick must be paid for at the rate of \$4 per thousand on wall measurement. Weyand denies this statement, and says that at that time he did not know anything about the fire brick, but his order was for second-hand brick for which he was willing to pay at the rate of \$4 per thousand. It is clearly proven that he did purchase red brick and paid for

them at that rate. It is also proven that when Voss, who was in charge of the sales, wanted Weyand to pay for fire brick at the same rate as for the red brick on wall measurement, that he objected, stating that he wanted to pay for them as he got them, and that in the talk between Voss and Weyand the price fixed per load for the fire brick by Voss was seventy-five cents per load. After Weyand had hauled some eighteen or twenty loads of fire brick, Lorington told Voss not to let him have any more in that way without he would consent to pay for them as wall measurement, but that if Weyand came there with a wagon to haul more, not to send him away empty. When Weyand came, Voss told him of the instructions received, but still Weyand refused to take the fire brick in that way, and he was permitted to take another load with the arrangement that he would, in the meantime, see Abt in regard to the matter of price. This he claims to have done, and that he was told to go on and haul the brick, which he did, until thirty-three loads were taken away, for which, on the written statement of Voss as to the amount, he paid Abt in full at the rate of seventy-five cents per load; Abt denies that he had any such conversation with Weyand. Voss testified that the price of the red brick was fixed by the firm, but that he fixed the price for the fire brick, and had sold them to other parties at a price fixed by him. The plaintiff testified that Voss had no authority to fix the price for the brick, but does not deny directly that he did have authority to fix the price for the tiling or fire brick. The fact that the tiling or fire brick were of irregular shape and of various sizes so that they could not be sold by the thousand, is corroborative of Voss' statement that he had authority to fix the price by the wagon load. If, in this case, it is conceded that he was instructed to only sell the fire brick by the thousand by wall measurement, then it became a question of fact whether or not he did not have that express authority. If Weyand told the truth he did have that authority. It was for the jury to determine the facts. In view of all the evidence and circumstances that surround the case, we do not feel authorized to say that the judgment is unsupported or vicious. Judgment is affirmed.

Judgment affirmed.

THE WIGGINS FERRY COMPANY
V.
ARTHUR HEILIG.

Master and Servant—Personal Injury—Order of Vice-principal.

In an action brought by a servant to recover for personal injuries alleged to have been suffered by him through obeying the order of his employer's vice-principal to splice a rope at a certain time and place, this court holds, in view of the evidence, that the judgment for the plaintiff can not stand.

[Opinion filed June 21, 1892.]

APPEAL from the Circuit Court of St. Clair County; the Hon. B. R. BURROUGHS, Judge, presiding.

Mr. CHARLES W. THOMAS, for appellant.

Messrs. MARTIN D. BAKER and B. H. CANBY, for appellee.

SAMPLE, J. This suit was brought by appellee to recover damages for a personal injury. His duty was to guide and handle a rope that passed around a winch or windlass on a pile driver. The appellant was engaged in putting in piles at the foot of Mound street, at the city of St. Louis. At the time of the accident, a pile, some forty feet in length, was being dragged to its proper place by a rope that was tied around it, extending thence to a single block that was fastened near to the point where the pile was to be driven, and thence extending over a pulley at the top of the derrick of the pile driver, thence to and around the winch managed by the appellee. The main rope in use was not of sufficient length, and it had to be lengthened by tying another rope to it. The sub-foreman, Stephen Hines, ordered appellee to tie a short rope to what is called the winch end of the main rope, to which appellee made some objections, suggesting that it had better be tied at the pile end, without stating why he thought

so. The appellee, however, obeyed the order as given: He put the shorter rope after it was tied, around the winch and started the engine which operated the winch. As the winch revolved the pile was drawn toward its place and also the splice made by tying the two ropes together approached the winch. In making this splice there were several feet of the end of the main rope that dangled. As the winch revolved, bringing the spliced portion of the rope to it, the appellee gave the short part of the rope or the loose end to another, and attempted to pass the spliced portion under and around the winch by shoving it with his hands while the winch was in motion, so that he might get a turn of the main rope around it, when the left sleeve arm of his coat was caught and his arm was pulled under and between the rope and winch, and broken in two places. The negligence alleged is the order of the foreman in requiring appellee to splice the main rope at the winch end instead of the pile end, which, it is alleged, caused the injury "by reason of the fact that when, by the revolution of the windlass, the end of the long line was reached, it became and was necessary, and was the duty of the plaintiff, to untie and take off the short line and attach the end of the long line to the windlass, which was dangerous to the plaintiff while the windlass was revolving." That the foreman gave the order as alleged is undisputed; that he did not at least expressly order how or the manner in which the rope should thereafter be operated is also undisputed; it is claimed, however, that the order implied that appellee should keep the winch in motion until, by its revolution, the end of the main line should be coiled around the winch one or more times. This is denied by appellant. The life of this case under the evidence is whether it was necessary, in order for the appellee to obey the order of the foreman, to keep the winch in motion until a turn was taken around it with the end of the long or main rope. There is a *quere* whether the declaration so states the case. It does aver that the appellee, in order to comply with the order, had to untie and take off the short line and attach the end of the long line to the winch, but it does not, at least expressly,

aver that this had to be done while the winch was in motion. It does, however, aver that it was dangerous to do so at such time. However, taking the case as made by the evidence, and it appears that it was the usual practice in the operation of this driver to splice the long rope at the winch end, whatever may have been the practice of others, and that the appellee was familiar with that custom as it had frequently been done by himself, he, as he states, having had a number of years' experience in that line of business. There is no evidence to show that prior to this accident the practice, of itself, was attended with danger. In saying this we do not overlook the evidence of Charles Hainer, who claims to have told Hines a week before the accident not to put the short rope at the winch end; if this statement is given full force it only indicates, in connection with the incident that called it forth, that to splice at that end was liable to create trouble by getting the rope entangled in the spool or winch head. We do not think that under the evidence in this case the order of itself shows negligence. Outside of the implication heretofore mentioned, in the very nature of the case it could not be negligent, for it did not involve the appellee in the slightest danger. To either tie or untie the ropes was not perilous, as the engine would be stopped at such time in either case. The cause of the injury and the negligence that contributed directly to it, was in shoving the spliced portion under the winch while it was in motion. Did the order of the sub-foreman, Hines, imply that the rope when spliced should be so operated? He says it did not. There is nothing in the terms of the order itself to indicate that it did. Neither is there any evidence to show that appellee was ever ordered to operate it in that way. It appears from the evidence without dispute that the operator of the winch operated or controlled the operation of the engine which was only four or five feet from his position. It is true that appellee testified that it was the usual custom not to untie the ropes until the long rope had been passed around the winch one or more times, but he further testified in the same connection that this was done "so we could hold the

Snowball v. the People.

strain." In this instance the pile was being dragged to its place on the ground, and all the witnesses who were asked, testified that in such case there would be no strain on the rope. This he certainly knew as well as any one, in view of his long experience in that line of work. So that neither by the terms of the order, nor the character of the particular work in which appellee was engaged at the time of his injury, can it be claimed that the implication of the foreman's order was that the rope should be passed around the winch while it was in motion. If these conclusions are correct, then on this record there can be no recovery, as the order alone is the basis of the action. The judgment is reversed and the cause remanded.

Reversed and remanded.

JOHN SNOWBALL

V.

THE PEOPLE OF THE STATE OF ILLINOIS EX REL.
WILLIAM GRUPE.

43	241
147s	200

Quo Warranto—Right to Office—Jurisdiction of Circuit Court—Schools.

1. An election must be held at the time and place required by law.
2. Whether a person who claims the right to, and exercises the powers of, a public office, has been lawfully elected, is a question in which the people have an interest, and they have the right to test the incumbent's title to the office by a proceeding in *quo warranto* and have him ousted if he has usurped the same, and Circuit Courts in this State have jurisdiction of such proceedings.
3. In a proceeding in *quo warranto* to try the title of a person named, to the office of member of the board of education of a school district in a certain county, composed of territory lying partly without and partly within a certain city, this court holds, that the judgment of ouster was properly entered therein, Chap. 46 R. S. 665, 1889, not having been observed as to that portion of the district outside said city.

[Opinion filed June 21, 1892.]

APPEAL from the City Court of East St Louis, Illinois; the Hon. B. H. CANBY, Judge, presiding.

Mr. F. G. COCKRELL, for appellant.

Messrs. M. MILLARD and M. D. SCHAFER, State's Attorney, for appellees.

There are only two principal questions in the case :

1. Whether the court had jurisdiction in a proceeding by *quo warranto* to try the defendant's right to the office.

2. Whether the poll established at the Allerton House should be regarded as an authorized voting place.

As to the first point, it is necessary to look into the legislation upon the subject, as well as the cases. There is nothing in the election law manifesting an intention to take away any jurisdiction the courts had in determining the validity of elections, so far as that might be necessary in adjudicating upon the rights of parties to an office.

"The principle is that the jurisdiction of the courts remains, unless it appears with unequivocal certainty that the legislature intended to take it away." Dillon's Municipal Corporations, Sec. 202, 4th Ed., 141, old number. And this court so regarded the rule in *People v. Bird*, 20 Ill. App. 568.

The Supreme Court, also, in the following unreported cases, has said it is the proper remedy against one illegally holding a local office. *Rafferty v. Gorman*, 27 N. E. Rep. 194; *Burgess v. Davis*, filed at Ottawa, Oct. 31, 1891.

But if it were necessary to give a construction to the provisions of the statute relating to contested elections, which would make it an exclusive remedy, and thus take away the jurisdiction of the courts to proceed by *quo warranto*, that is not a tenable position now, because the act in relation to *quo warranto* took effect in 1874; and that necessarily restored any jurisdiction lost by the operation of the election law, which was passed in 1872.

These statutes are both affirmative in their provisions, and while it is the true view to hold that the election law did not repeal or affect the old *quo warranto* act, still, if that is not

accepted as a proper construction, the enactment of a law giving this remedy again to the courts must be regarded as an intent to re-invest them with jurisdiction.

These were always concurrent remedies, however, and still are; and there is no way of arriving at a different conclusion, without saying that the election law operated as a repeal, to a certain extent, of the old *quo warranto* act; and when this is affirmed, it follows that the same rule of construction must be applied to the later statute "reversing the law in relation to *quo warranto*," which in turn repeals or modifies the election law.

It is agreed in this case, and it is the fact, that the board of education did not at any time fix or designate a polling place "within the territory lying outside of the city," and that the president of the board, about eight o'clock on the morning of the election, with the consent of the other members, repaired to the Allerton House, situated in such outlying territory, and established the poll, at which seven votes were cast for appellant.

These votes gave appellant his majority, and there is no dispute about the polling places and votes cast in the city.

The present school law provides that the board shall give ten days' notice of the time and place of holding an election; and if no notice shall have been given for the annual election, then that ten days' notice shall be given for some other day. Art. 6, Secs. 6, 7.

An election held without the notice required by law, is void. *People v. Ringe*, 54 Ill. 123; *Williams v. Potter*, 114 Ill. 628.

The above are selected from a great number of cases sustaining the rule, on account of some additional features parallel with the case at bar.

In the first case it was held not sufficient for the city council to meet on the day before the election and have a verbal understanding when the election should be held, and that the record be subsequently made up accordingly.

In the other case it was held, that when a number of persons assemble at a place not authorized by law, organize a poll,

receive and count the votes, the whole proceeding is illegal and void, however well intended.

The case cited by appellant, *Simmons v. The People*, 18 Ill. App. 588, needs but little attention, as it is not only at variance with the best authorities on the question, but the general practice in this State.

Besides, it does not appear the court's attention was called to the fact that the present *quo warranto* act is subsequent to the election law, and by express terms authorizes the proceeding.

As to the contention that Grupe lost whatever rights he had to the office by attempting to contest under the statute, the obvious answer is that his interests in this proceeding are of no consequence. The question is not whether Grupe is entitled to the office, but whether Snowball holds it under a good title. It makes no difference whether Grupe is in or out of the case, as it concerns public rights alone. *Chesshire v. The People*, 116 Ill. 493.

In that case *quo warranto* was brought to oust some school directors, and the court say, in answer to an objection, that the information did not involve a "matter of private right," but concerned "the public alone."

GREEN, P. J. This was a proceeding in *quo warranto* to try the title of appellant to the office of member of the board of education of a school district in St. Clair County, composed of territory lying partly within, and partly without the city of East St. Louis. The cause was tried by the court upon a written stipulation of facts, whereby it was admitted the board of education of said district held a meeting and made a general order for the holding of an election to elect members of said board, and gave proper notices thereof to the board of election commissioners of said city, whose duty it was to appoint judges and clerks of election, fix the polling places, and give notice for holding said election in that portion of the territory *lying within* the limits of the city, and that the commissioners performed this duty. That the board of education caused notices of said election to be posted as required by

Snowball v. The People.

law, but made no order at any time fixing any polling place within the territory *lying outside* of said city, nor appointed any judges or clerks for said outlying territory. That on the morning of the day of election, about eight o'clock, the president of the board of education, with the consent of other members thereof, with a ballot box, repaired to the Allerton House, situated within said outlying district, and informed certain voters then assembled, that they had the right to establish a polling place in said outlying territory, appoint judges and a clerk of election, and cast their votes for president and two members of the board of education, and that all the voters living in said territory had the right to vote at such polling place, and could not vote elsewhere at said election. Whereupon, said voters present selected two of their number as judges, and one as clerk, who were duly sworn and cast their own, and received the votes of others, and at said polling place, seven votes were cast for Snowball and none for the relator, Grupe. That said polling place was kept open during the time required by law, and the vote duly certified to said election commissioners, and was, together with the vote cast inside of the city, within seven days thereafter, presented to the County Court, and was there duly canvassed by the county board, and said Snowball was declared duly elected, received his certificate of election, was admitted as a member of the board of education, and is now exercising the duties of said office. The remaining facts admitted by the stipulation relate to proceedings in the County Court by Grupe against Snowball, to contest the election, and are not material, inasmuch as the questions here involved are concerning a public right, and not the personal private rights of Grupe. It appears also that the seven votes cast for the respondent at the Allerton House gave him his majority, and without them he was not elected. As we understand this case, two questions only, require consideration: first, had the Circuit Court jurisdiction and power to try and to determine the question of respondent's title to said office in a *quo warranto* proceeding? second, was the polling place at the Allerton House lawfully established, and can the votes cast there be held to be votes

which legally ought to have been counted for the respondent? Whether a person who claims the right to, and exercises the powers of a public office has been lawfully elected, is a question in which the people have an interest, and they have the right to test the incumbent's title to the office by a proceeding in *quo warranto* and have him ousted if he has usurped said office. *Chesshire v. People*, 116 Ill. 493. This court, in *People v. Bird*, 20 Ill. App. 538, sustained the Circuit Court in taking jurisdiction in *quo warranto* to test a person's title to an office, and we repeat what we there said: that we can not hold Circuit Courts in this State have not jurisdiction of such proceeding, and power to test and determine the title to a public office and oust one who has usurped the same, and thus prevent a wrong to the people. We have not as yet been furnished with any sufficient reason or authority for receding from that opinion. With regard to the second question, it is sufficient to say that the power to fix the time and place of holding said election and to appoint judges and clerks thereat in that part of the school district lying outside of the city, is given by law to the board of education. Chap. 46, R. S., 665, 1889. It is admitted in this record that that body did not locate the polling place, nor appoint the judges or clerk at the election held outside of the city of East St. Louis, but that a few persons assembled at a place not authorized by law, organized and held an election for members of said board of education, and received and counted seven votes for the respondent. The whole proceeding was illegal and void, and said votes were illegally counted for Snowball, and he was not legally elected. *Williams v. Potter*, 114 Ill. 635. In *Stephens v. People*, 89 Ill. 342, this doctrine, announced in *McCreary on Elections*, Sec. 109, is cited with approval: "It is, of course, essential to the validity of an election that it be held at the time and in the place provided by law." Entertaining the views above expressed, it follows that we hold the judgment of ouster against defendant was properly entered, and it is affirmed.

Judgment affirmed.

C., C., C. & St. L. Ry. Co. v. Richey.

THE CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS
RAILWAY COMPANY

V.

JOSEPH RICHEY.

*Railroads—Negligence of—Personal Injuries—Failure to Signal—
Crossings—Practice.*

1. It is for the jury in a personal injury case to decide from the evidence whether the statutory signals were given upon a certain occasion.

2. The mere failure to ring a bell or sound a whistle, does not create a liability. It must be shown, in addition, that the injury was occasioned by such negligence, and that the person, when injured, was in the exercise of ordinary care.

3. An appellate court can not determine whether instructions were properly refused without knowing what instructions were given. The abstract of an appellant is full notice to an appellee of the condition of the record in a given case, and such court must assume that if the record was deficient, his counsel would have had it corrected.

4. In an action brought to recover damages from a railroad company for personal injuries alleged to have been suffered through its negligence, this court holds, in view of the refusal of certain instructions touching care of the plaintiff and negligence of the defendant, asked by the defendant, that the judgment against it can not stand, the same being material for the proper presentation of the law of its side of the case.

[Opinion filed June 21, 1892.]

APPEAL from the Circuit Court of Crawford County; the
HON. S. Z. LANDES, Judge, presiding.

Messrs. WILLIAM H. DYE and CALLAHAN, JONES & LOWE,
for appellant.

Mr. GEORGE N. PARKER, for appellee.

SAMPLE, J. Joseph Richey brought this suit for alleged injuries caused by, as averred in his declaration, the negligence of the defendant's servant in failing to ring a bell or sound a whistle on an engine that was then being operated by them

before it reached a highway crossing just north of the town of Flat Rock, whereby he was induced to or did drive his horse attached to a buggy in which he was riding, on to said railroad track, at such crossing, and so near to the approaching train that was giving no signal, that thereby his horse became frightened, suddenly turned about, upset the buggy, and threw the plaintiff violently to the ground, whereby, as alleged, he was seriously injured, while, during all said time, he was exercising ordinary care for his own personal safety. The plaintiff obtained a verdict and judgment below from which this appeal is prosecuted, and many errors assigned, among others, the refusal of the court to give to the jury proper instructions asked by the defendant. It appears from the evidence that the plaintiff had driven up to the railroad crossing of the highway and there waited while one freight train passed over the crossing, and immediately thereafter started to cross over in his buggy, when, as the horse got to the track, another freight train was approaching said crossing quite near but not at a very rapid rate of speed, which frightened the horse so that he turned suddenly, became unmanageable, and after running a short distance, the buggy came in contact with a culvert in the highway which caused the buggy to be upset and the plaintiff to be thrown quite violently to the ground upon his head and shoulders. The train was proceeding north and the plaintiff was crossing the track from the west within a few feet of the south line of the highway; and within the defendant's right of way was a warehouse, and on a side track, which, with the main track, crossed said public highway, there were two or three box cars within, according to the evidence, a very short distance of the highway crossing, all of which doubtless seriously obstructed the plaintiff's view of this second train coming from the south. It further appears from the evidence that the plaintiff did not know, and as he says, did not anticipate, that the second train was following the first one, and therefore, as he crossed the track immediately after the last car of the first train had passed over the crossing, his attention was directed to and attracted by the moving train, and from the evidence it appears that he was looking in

that direction until his horse, having reached the main track and discovered the second train so nearly upon him, became frightened, turned and upset the buggy as before stated. The plaintiff testified and introduced other evidence tending to show that no bell was rung or whistle sounded to announce the approach of the train, causing as alleged, the accident, while the defendant introduced the men in charge of the train to show that such signals were properly given. It was for the jury to determine the fact about that disputed point. But there is another material element in the case beyond that question, even if the signals were not given, and the defendant thereby was guilty of negligence, and that is, was the plaintiff in the exercise of ordinary care for his own safety? It has been so repeatedly held that no citation of authority is required to support the statement, that the mere failure to ring a bell or sound a whistle does not create a liability. While it is true such failure creates a *prima facie* case of negligence, yet to create a liability two other facts must be established: first, that the injury was occasioned by such negligence; second, that the person injured thereby was in the exercise of ordinary care. As bearing upon this latter fact, the jury answered a special interrogatory that the plaintiff did not make any effort to ascertain whether a train was approaching from the south before attempting to cross the track. Without assuming now to decide, or even intimate, in view of other special findings of the jury and the peculiar facts in this case, that such finding of itself would defeat or bar a recovery, yet it indicates, notwithstanding the other special findings in favor of the plaintiff, that the question was a close one. This brings us to the consideration of an assigned error which must reverse this case. The defendant submitted, as appears by this record, eleven instructions, many of them bearing upon the material question of the duty resting upon the plaintiff to exercise ordinary care, and all of them were refused. The defendant has no given instruction in this record; the defendant offered the following instructions which we hold were material for the proper presentation of the law of its side of the case and were improperly refused: first, that the plaintiff

can not recover in this action unless a preponderance of the evidence satisfies the jury of the following facts: that the plaintiff in approaching the railroad crossing exercised due caution and care for his own personal safety; second, that the servants of the defendant in charge of the train which plaintiff claims frightened his horse were guilty of negligence; and third, that the plaintiff was injured by reason of the negligence of defendant's servants in charge of said train. If the evidence does not establish the truth of each of the foregoing propositions by a fair preponderance of evidence, the jury should find a verdict in favor of the defendant. The jury are also further instructed as a matter of law that the omission by the defendant or its servants to ring the bell or sound the whistle at public crossings, if proven, is not of itself sufficient to authorize a recovery by the plaintiff, if the jury believe from the evidence that the accident, by the exercise of ordinary care, might have been avoided. It is quite apparent that it was highly important to the defendant to have the jury instructed as to what the plaintiff must prove in order to entitle him to recover, and especially as to the duty resting upon him under the law to have exercised care to avoid the accident. It is suggested by appellee's counsel in an appendix to his argument, that by an examination of the record, it will appear that "all the instructions asked by appellant were given." In this he is mistaken, for on the contrary the record shows (which alone must govern us) that no instructions were given for appellant, but that they were all refused. If instructions were in fact given for the appellant on the trial below, then, to put it mildly, this is a very imperfect record. An appellate court can not determine whether instructions were properly refused without knowing what instructions were given. The abstract of appellant was full notice to the appellee of the condition of the record, and we must assume, if the record was deficient in this respect mentioned, that his counsel would have had it corrected. The judgment is reversed and the cause remanded.

Reversed and remanded.

CLEVELAND, CINCINNATI, CHICAGO & ST. LOUIS RAIL-
WAY COMPANY

V.
GEORGE MYERS.

43	251
47	321
43	251
53	635

Railroads—Negligence of—Failure to Fence—Killing of Hog.

1. A railroad company is not bound to fence its track at a point used by the public in the transaction of its business therewith.

2. In the absence of evidence of common law negligence, a person can not recover for injury to stock at a point which the company was not bound to fence.

3. The burden of proof is on the plaintiff to show that the place in question was required to be fenced.

[Opinion filed June 21, 1892.]

APPEAL from the Circuit Court of Saline County; the
Hon. A. K. VICKERS, Judge, presiding.

Mr. W. H. DYE, for appellant.

Mr. A. W. LEWIS, for appellee.

SAMPLE, J. Appellee's hog was killed by appellant's engine at a place called Carrier Mills. The right of recovery is based on the failure of appellant to fence its track at that place. The principal defense is that the company was not required to fence its track there. The undisputed facts are that Carrier Mills is a station on the line of the appellant's road where it has a sidetrack, depot and cattle-pens as conveniences for the transaction of business for the public. There is also a grain or warehouse near its sidetrack from which grain is loaded into its cars. The village is unincorporated, but is laid out into lots, blocks, and streets. The tracks run through the village from northeast to southwest, on each side of which there are buildings; the usual business of a country village is represented in its makeup. The village is situated in a rich

agricultural and timber country which supplies large shipments, and, as we think the evidence fairly shows, requires substantially all the space along the sidetrack for the proper and convenient handling of products brought to that station for transportation. The hog in question was near the warehouse, probably eating grain that had fallen to the ground in loading it from the warehouse into appellant's cars, where the hog was killed. There is no evidence to indicate where it got on the track of appellant. The burden is on appellee to show that the hog got on the right of way at a place where appellant was required to fence its road. This, appellee has failed to prove, and as no common law negligence is shown, the plaintiff was not entitled to recover. In view of the numerous decisions of our courts, the appellant was not required to fence its track along the line of its switch, where, as the evidence shows, the space was substantially all used by the public in its transaction of business with the railroad company. This doctrine is so well established in this State that it is not necessary to reiterate the reasons upon which it is founded, or to cite the authorities so familiar to the profession. Judgment is reversed and the cause remanded.

Reversed and remanded.

E. G. SCUDDER AND W. A. SCUDDER, CO-PARTNERS,

V.

J. H. CARTER.

Contracts—Payment of Debt of Another.

1. A promise to pay the debt of a retail dealer to a wholesale merchant as a part of the consideration of a sale of the stock of such retail dealer to the promisor, is founded on a legal consideration.

2. If the promise is in the nature of an original undertaking to pay the debt of a third party, and is founded on a valuable consideration received by the promisor, it is not within the statute of frauds.

3. Such promisor can not defeat recovery of the debt he promised to pay, because of any secret agreement he may have had with the original debtor.

Scudder v. Carter.

[Opinion filed June 21, 1892.]

APPEAL from the County Court of Johnson County; the Hon. THOMAS J. MURRAY, Judge, presiding.

Messrs. WHITNEL & GILLESPIE, for appellants.

Mr. WILLIAM A. SPANN, for appellee.

GREEN, P. J. J. D. Harvick, a dealer in general merchandise in Vienna, Illinois, was indebted to appellants for goods sold and delivered to him prior to October 13, 1890. On that date he sold his entire stock to J. H. Carter, appellee, and notified appellants by letter of the sale, and that Carter would settle with them. Upon receipt of this letter they wrote to Carter asking him if he had agreed to pay Harvick's indebtedness to them. In answer to this, on October 17, 1890, Carter wrote to appellants, "Your letter to hand. In answer will say that I bought out J. D. Harvick's stock and I owe for it, and I was to have four months to pay, *so I will pay your bill* as soon as I agreed to with Mr. Harvick." On receipt of this letter, appellant notified Harvick that Carter claimed four months' time to pay and asking if that time had been given by Harvick. On October 22, 1890, Harvick replied that he had sold out to Carter with the understanding that he was to pay all bills that Harvick owed, and there was no time stated. Thereupon appellants wrote to Carter, informing him of the contents of Harvick's letter, and asking that their claim be paid when due. No answer was returned by Carter. On November 22, 1890, appellants again wrote to Carter, inclosing statement of Harvick's account, and asking when they might expect payment. Carter did not reply to this and on March 12, 1891, appellants drew sight draft on him for \$61.53, the amount of Harvick's debt, which was dishonored. On March 24, 1891, appellants again wrote to Carter advising him of the non-payment of the draft, reminding him of his agreement and promise to pay in four months; that they had waited until that time had elapsed and wanted

their pay. They requested him to let them hear from him about the matter and remit the amount due at once. No reply being made to this, they commenced suit. It is not disputed that on October 13, 1890, Harvick owed appellants \$61.53, the full balance claimed by them. But he and Carter testified that in this amount the price of a barrel of sugar was included which Carter did not get, and Harvick did get, with Carter's knowledge. This barrel of sugar Harvick bought of appellants on October 10th. It was delivered in Vienna and was in the depot there when the sale was made to Carter, who then knew it was there and that Harvick had bought it of appellants. It thus appears the price of the barrel of sugar was a part of the debt Harvick owed on the day of the sale and which appellee promised to pay appellants. The evidence establishes a valid contract between Harvick and Carter, by the terms of which the latter agreed to pay to appellants Harvick's debt. It was supported by a good and valuable consideration, and was not within the statute of frauds. A promise to pay this debt as a part of the consideration of purchase is founded on a sufficient legal consideration. *Lith. Co. v. Kerting*, 107 Ill. 344. If the promise is in the nature of an original undertaking to pay the debt of a third party, and is founded on a valuable consideration received by the promisor himself, it is not within the statute of frauds. *Wilson v. Bevans*, 58 Ill. 232; *Meyer v. Hartman*, 72 Ill. 442. It is quite evident from the correspondence and the acts of appellants that they acquiesced in and adopted the contract, accepted Carter as their debtor and relied upon his promise to pay them, and his liability is clearly established. It is sought to evade this liability by the testimony of Harvick and Carter, showing that between themselves there was an agreement made at or about the time of sale, but before the date of Carter's letter of October 17th and Harvick's letter of October 22d, received by appellants, different from the contract in those letters described, in this, that Carter was to pay Harvick's debts only upon orders given to his creditors; and inasmuch as appellants never presented to Carter an order from Harvick to pay them the debt he owed and which

Tompkins v. Gerry.

Carter had promised to pay, therefore this suit could not be maintained. Carter was bound by the contract stated in his letter and the letter of Harvick, upon which appellants acted, and he is estopped from setting up an agreement undisclosed to them, between Harvick and himself, limiting his liability to the payment of the debts only, for which Harvick gave orders to his several creditors. He can not by such defense defeat the recovery of the debt he distinctly and without condition, other than extension of time, promised on October 17, 1890, to pay appellants. This cause was tried by the court without a jury and judgment was entered against appellants for costs. This was error. The judgment ought to have been for them in the amount of \$61.53 and costs of suit. The judgment is reversed and cause remanded.

Reversed and remanded.

H. TOMPKINS

V.

JAMES GERRY.

Practice Act, Sec. 30—Sec. 49, Chap. 79, R. S.

1. Sec. 30 of the Practice Act, which permits a defendant having claims or demands against the plaintiff in a given action, to plead the same, or give notice thereof under the general issue, or under the plea of payment, and provides that the same or such part thereof as he shall prove on trial, shall be set off and allowed him, is not mandatory. It differs in that respect from Sec. 49, Chap. 79, R. S., which requires parties to suits before justices to bring forward all existing demands which are of such a nature as to be consolidated, and which do not exceed \$200 when consolidated.

2. The commencement of a suit in the Circuit Court will not bar or preclude the defendant therein from bringing a suit in a justice court against the party bringing the same.

[Opinion filed June 21, 1892.]

APPEAL from the County Court of Wayne County; the
Hon. WILLIAM KNOELL, Judge, presiding.

MESSRS. ADAMS & BONHAM, for appellant.

MESSRS. CREIGHTON & KRAMER, for appellee.

GREEN, P. J. Appellant brought suit against appellee in the Circuit Court of Wayne County, on May 5, 1891. Writ returnable to October term, 1891. Summons served May 6th. On May 11, 1891, appellee sued appellant before a justice of the peace of said county. The case was called for trial on May 19th. Appellant appeared and filed a plea setting up the pendency of the first suit, and moved to quash the writ and dismiss the suit. The court overruled the motion; heard evidence introduced on behalf of appellee and entered judgment in his favor for \$188.44. From this judgment appellant took an appeal to the County Court, and then refiled his said plea signed and sworn to. Appellee filed a general demurrer to said plea, which was sustained by the court; appellant abided by his plea and refused to further plead, whereupon the court heard evidence and entered judgment for appellee for \$188.44. To reverse this judgment appellant took this appeal. The demurrer was properly sustained. The law did not require Gerry to come in and set off his claim against Tompkins in the first suit, nor did the commencement of that suit bar or preclude Gerry from bringing his suit against Tompkins. Sec. 30 of the Practice Act permits a defendant having claims or demands against the plaintiff to plead the same, or give notice thereof under the general issue, or under the plea of payment, and the same, or such part thereof as he shall prove on trial, shall be set off and allowed him. We do not regard this section mandatory, but it differs in that respect from Sec. 49, Chap. 79, R. S., which requires each party in suit before a justice of the peace to bring forward all existing demands which are of such a nature as to be consolidated, and which do not exceed \$200 when consolidated. *Laythrop v. Hayes*, 57 Ill. 279; *McDole v. McDole*, 106 Ill. 452. The judgment of the County Court is affirmed.

Judgment affirmed.

RICHELIEU WINE COMPANY

V.

JOHN RAGLAND, SHERIFF.

Replevin—Husband and Wife—Sales.

1. A wife may not, without authority, deliver to the consignor, goods sold and consigned to her husband, he having deserted his family.

2. In an action of replevin brought to recover a quantity of liquors seized by the sheriff under a writ of attachment sued out by the creditors of a party named, this court holds, in view of the evidence, that plaintiff's remedy is by suit upon the contract for the purchase money, and that the judgment for the defendant can not be interfered with.

[Opinion filed June 21, 1892.]

APPEAL from the Circuit Court of St Clair County; the Hon. B. R. BURROUGHS, Judge, presiding.

Mr. R. W. ROPIEQUET, for appellant.

Messrs. TURNER & HOLDER, for appellee.

GREEN, P. J. Appellant brought this suit in replevin against John Ragland, sheriff of St. Clair County, to recover a quantity of liquors seized by him under a writ of attachment sued out by the creditors of John F. Pannier. The cause was tried by the court, the finding was for defendant, a writ of retorno was awarded, and judgment was entered against plaintiff for costs. To reverse the finding, order and judgment, plaintiff took this appeal. The goods in controversy were sold by appellant to Pannier for \$760. It is not pretended he was guilty of false pretenses or fraudulent representations as to his financial condition in negotiating the purchase. By the terms of the sale he was to pay \$200 before he received the goods, and no time was fixed for the payment of the balance. After the goods had been shipped, appellant drew on Pannier

at one day's sight for \$200, which draft was returned unpaid. The goods were shipped from Chicago to Pannier September 18, 1890, and were taken by direction of his wife from the railroad depot to his place of business in Belleville, on Saturday, September 20, 1890, he having left home that day for St. Louis. They were shipped, and the invoice and bill of lading sent him without any condition or reservation. The delivery of these goods to Pannier by the carrier was not made dependent on the payment of the \$200, but after the shipment, appellant neither claimed nor exercised dominion over or control of the goods as vendor. This is shown by the evidence and the following letter sent Pannier on behalf of appellant:

"CHICAGO, ILL., Sept. 18, 1890.

J. F. PANNIER, Esq., Belleville.

Dear Sir:—We inclose you invoice and bill of lading for goods sent you, which we trust will reach you safely and prove altogether satisfactory. As per instructions of our Mr. Goldberg, we have made draft on you at one day's sight for \$200, which we trust you will protect. We hope to be favored with future orders from you, which will have our prompt and careful attention.

Very truly yours,

P. H. HEFFRON."

And even after appellant had been notified at 11:45 A. M., September 23, 1890, by its attorney, that Pannier had disappeared and attachments would be taken out, the reply was, "attach our goods, claim seven hundred eighty sixty-six," thus indicating that appellant then regarded the sale and delivery fully consummated, and relied upon their right to recover the purchase price by suit upon the contract. If by the terms of the sale \$200 was to be paid by Pannier before he could demand the delivery to him of the goods, yet the evidence shows appellant waived payment as a condition precedent to such delivery, and hence the title to and right of possession of the goods in controversy became vested in Pannier, and appellant's remedy is by suit upon the contract for the purchase money. Benjamin on Sales, 4th Am. Ed., Secs. 353

to 356; Mich. Cent. R. R. Co. v. Phillips, 60 Ill. 190. Under the facts proven, the attaching creditors occupied the same position, and were invested with the same rights as against appellant, as a *bona fide* purchaser from Pannier. Van Duzor v. Allen, 90 Ill. 499. It is claimed, however, in behalf of appellant, that before the writ of attachment was levied, the wife of Pannier delivered the goods to the agent of appellant, and thereby it became the owner and entitled to the possession thereof as against appellee. No authority to her from the husband is shown to rescind the sale or deliver the goods to appellant. She had no such authority at common law, and the letter from her husband received by her two days after his departure, in which he wrote, "he could get no help, that he must go away, and for her to take care of the children," conferred no authority upon her to dispose of the goods, nor did any statutory provision give her such right. In case the husband deserts his family, the wife may prosecute or defend in his name, any action which he might have prosecuted or defended. Sec. 3, Chap. 68, R. S. By Sec. 11, same chapter, it is provided, if the husband or wife abandons the other and leaves the State, and is absent therefrom for one year, without providing for the maintenance and support of his or her family, any court of record in the county of their residence may, upon petition, if satisfied of the necessity by the evidence, authorize him or her to manage, control, sell and incumber the property of the other, for the purpose of support of the family, or paying debts of the other, or debts contracted for such support. The wife of Pannier was given no authority to dispose of his property, as she did, by either of these sections, and our attention has been invited to no others by the provisions of which such authority was conferred upon her. We reach the conclusion from the evidence, that the goods in controversy were not the property of appellant when it commenced this suit, but were liable to the levy made by the sheriff; hence the finding, order and judgment of the trial court are affirmed.

Affirmed.

43	260
90	558

THE OHIO & MISSISSIPPI RAILWAY COMPANY

V.

WILLIAM SIMMS, ADMINISTRATOR.

Railroads—Negligence of—Immoderate Rate of Speed—Ordinance—Negligence of Postal Clerk—Throwing of Mail Sacks.

1. A railroad company must, in the use of its franchise, so exercise its rights as not to negligently injure others, and is responsible for the negligent acts of its servants, and for the habitual carelessness which it knows of and permits to be practiced by others on its trains, and is also liable for the negligence of any other company or person whom it permits to use its road, and this rule applies to postal clerks.

2. A railroad company permitting its train boys to sell papers upon its depot platforms to citizens of towns through which its road passes, is responsible for injuries to such persons occasioned by the wilful negligence of its servants in running its trains at a high and unlawful rate of speed, and the throwing of mail sacks from such swiftly moving trains upon the same.

3. In the case presented, this court holds as proper, evidence going to show that people usually came upon the platform when trains arrived, without objection by defendant; that it was likewise proper to introduce evidence touching the practice of throwing mail sacks from moving trains upon the platform, but that it was not proper to permit the plaintiff to show by a witness that the latter was struck by a mail sack near the platform, two years before.

4. Upon the question of damages in such case, it is improper to admit evidence touching the expense of supporting the family of the person killed per year at the time of the death. The damage recoverable is just compensation for the loss of means of support which deceased might have provided had he lived.

5. An instruction in such case, setting forth that defendant is liable for all damages occasioned by a certain negligent act, should not be given.

[Opinion filed June 21, 1892.]

APPEAL from the Circuit Court of Lawrence County; the Hon. E. D. YOUNGBLOOD, Judge, presiding.

Messrs. POLLARD & WERNER, for appellant.

Messrs. GEE & BARNES, for appellee.

GREEN, P. J. Appellee, administrator of the estate of Andrew J. Lackey, brought this suit under the statute to recover damages for the death of the intestate, alleged to have resulted from injuries occasioned by defendant's negligence. This negligence, as charged in the plaintiff's declaration, is in running defendant's train at an immoderate rate of speed through the city of Sumner, and at a rate forbidden by the city ordinance, and permitting the postal clerk upon the postal car in said train, while the train was running at such speed, to carelessly throw from the car upon defendant's station platform a heavy mail bag, which struck deceased and injured him, and by reason of the injuries so received his death resulted. It is also averred that defendant knowingly and wilfully permitted the postal clerks in charge of the mail to habitually, in a careless, negligent and improper manner, for many days prior to the day deceased was injured, to throw out heavy mail sacks from the fast moving postal car at said platform. The trial resulted in a verdict and judgment for plaintiff for \$2,000 damages and costs of suit. To reverse this judgment, defendant appealed. The evidence in our judgment fairly established the following facts: That defendant, by a contract with the government, was carrying the mails in its own postal car forming a part of a regular train, under the management and control of its servants and agents; that said train at the time deceased was injured, was running through the city of Sumner at a very high rate of speed and in violation of the ordinance of the city limiting the rate to twelve miles an hour; that the city of Sumner was then a regular station on the line of defendant's road, where mail matter was discharged from, and received upon defendant's trains; that a short distance from the west end of the platform a crane to receive the mail sack was erected by appellant and mails were received and thrown off at that point for some time. There was no street at this point and the approach to the steps leading up to the platform was at the east end, about two hundred feet distant. Appellant permitted a ditch and mud holes to remain about the place where the mail was thrown off near the crane, and complaint was made by the

postmaster to appellant that mail sacks thrown into these muddy places were injured, and after such complaint for a long time anterior to the injury mail sacks were thrown from trains upon the platform and in the public street at its east end. Appellant, through its servants and agents, knew of this practice, and that numbers of people were in the habit of coming on the platform and in the street when trains were passing. On the day in question, defendant's accommodation, due at Sumner before the mail train, was late, and deceased not knowing this fact, but hearing the approaching train, and supposing it to be the accommodation which stopped at Sumner and from which the daily papers were supplied by the train boy, came over to the platform to get his paper, stepped up at the east end, and while standing on the north edge of the platform was struck and knocked down by a mail sack thrown by the postal clerk from the swiftly moving train upon the platform, and was so injured that his death resulted. No contributory negligence on the part of deceased is disclosed by the record, and the jury were warranted by the evidence in finding defendant guilty of wilful negligence as averred in the declaration. Its servants and agents knew this platform was a place where a number of persons were likely to be at times when trains were passing; that it had been the practice of the postal clerks to throw mail sacks from moving trains upon the platform; and it was bound to take notice that the natural and probable consequence of such practice might be injury to those standing upon the platform. It had control of the movement and speed of its train, and at least such control of the postal clerk as to prohibit him from doing an act that might result in such injury. Defendant should be held liable for all of those consequences which might have been foreseen and expected as the results of its negligence. 2 Parsons on Contracts, 1st Ed. 456.

* The proximate causes of the injury to, and death of plaintiff's intestate, was the wilful negligence of appellant in running its train at a high rate of speed and permitting the mail sack to be thrown from the moving train upon the platform; the mere fact that the act of the postal clerk co-operated does not

affect the question. Had the train been stopped, or its speed reduced so that the sack would not have struck the platform with force and rebound as it did, or had it not been permitted to be thrown on the platform, the injury would not have occurred. It is contended, however, on behalf of appellant, that their postal clerk "was not the agent or servant of appellant, nor one over whom it could exercise any control whatever," hence, appellant is not chargeable with his acts, and is not liable therefor. We apprehend that a railroad corporation in the use of its franchise must, like natural persons, so exercise its rights as not to negligently injure others, and is responsible for the negligent acts of its servants, and for the habitual carelessness which it knows of and permits to be practiced by others on its trains, and is also liable for the negligence of any other company or person whom it permits to use the road. *Shearman & Redfield on Negligence*, 4th Ed., Sec. 459; *P. & R. I. Ry. Co. v. Lane*, 83 Ill. 448. In this case last cited appellant was the owner of track, right of way, and franchise of the road when the accident occurred, and by agreement permitted another company to run its trains over the track from Rock Island to Orion. The accident was received by the derailment of the baggage car in the train of said company while running over that part of appellant's track. It was held that the corporation, holding the franchises and exclusive right to operate a road, must so use it as not to endanger passengers or property, whether the use be by itself, or others they may permit to use the road, and if it permits another to run its trains on and over its tracks and injury grows out of the negligence of the company thus permitted, the corporation owning the road and franchise will also be liable.

In the case of *Carpenter v. Boston and Albany Ry. Co.*, 97 N. Y. 494, a passenger waiting to board defendant's train was injured by a mail sack carelessly thrown from a postal car upon a station platform. In the opinion it is said, defendant constructed the postal car and owned it. It was occupied under defendant's permission for a certain use, and it may be conceded there was nothing in the nature of that use to

require defendant to expect the contents of that car would be violently cast upon the platform while its train was in motion and before the passengers therein could reach the cars. Had this accident, therefore, happened on the first passage of the car the defendant might be excused on the ground that the mere act of the postal clerk in throwing off the mail bag at that place without the previous knowledge of the defendant of his intention to do so was not negligence on its part; but the fact is quite otherwise. The practice which led to the accident was a familiar and usual one; it was proven by uncontradicted evidence that this method of discharging mail bags from the postal car upon the platform provided for passengers, and while they were upon it and exposed to injury, had prevailed for a long time under circumstances from which notice to defendant might be fairly implied, and with the actual knowledge of defendant's agents in whose presence the act was frequently, if not daily performed. They were, therefore, chargeable with notice that the mail bag was likely to be thrown off in the same manner and under the same circumstances at any arrival of a postal car. By this knowledge defendant was brought fairly within the rule which enjoins care not only on the part of itself and its servants, but also like care in preventing injury from the careless or wrongful act of any other person whom it permits to come upon its premises. The occupants of the postal car are no exception to this rule. They come under a contract voluntarily made by the defendant and which secured the carriage and delivery of the mails upon such conditions as it imposed or acceded to. Its police power extended over the persons employed in it while they were on defendant's track or at its stations, certainly not to interrupt them in the discharge of their official duties, but so far as practicable to prevent injury to those for whose safety it was bound to provide. The same rule as announced in the foregoing quotation with regard to the duties, power and liability of railroad corporations carrying mails is also held in *Snow v. Fitchburg R. R. Co.*, 136 Mass. 552. It is said, however, in each of these cases the party injured was a passenger, and also that defendant in each case

voluntarily contracted to carry mails, while in the case at bar deceased was a stranger, to whom appellant owed no duty of protection, and it was *compelled* to carry the United States mails by law; hence cases cited are not in point. The same law was in force when those cases were decided, and as we understand the evidence, no coercion compelled appellant to carry the mail, but it did so voluntarily and without objection, for a compensation agreed upon. Nor do we understand the right of recovery in those cases is based alone upon the neglect to perform a duty which the defendants owed to a passenger, but it rests upon the broad principle that one must so use his own as to not unnecessarily and wilfully injure the person and property of another.

Defendant permitted the daily papers to be sold upon their platform by the train boy on one of its trains to the citizens of Sumner, and they were then, with the knowledge and consent of defendant, invited and permitted to come upon the platform when trains arrived, to purchase papers. For this purpose deceased came upon it and was lawfully then entitled to the protection appellant could afford by doing its duty and preventing the wilful negligence of its servants in running its train at a high and unlawful rate of speed, and preventing the discharge of mail sacks from the swiftly moving train upon said platform. We have examined the case cited by appellant, 61 Wis. 326, where an apparent different ruling from that in the New York and Massachusetts cases, *supra*, is made; but the decisions in the two latter cases are fortified by numerous authorities, while the first seems to be unsupported except by the ingenious reasoning of a very learned judge, in which we are unable to concur. We are of opinion that the averment in the declaration touching the city ordinance was sufficiently certain to justify the admission of said ordinance in evidence, and it was not error to admit evidence showing that numbers of people usually came upon the platform when trains arrived, without objection by defendant. It was not proper to permit plaintiff to show by witness Waller that he had been struck by a mail sack while on the ground a rod and a half from the platform some two years before this accident, but evidence

was properly admitted to show the practice of throwing mail sacks from moving trains onto the platform. It was error to admit this testimony on behalf of plaintiff:

“Q. I will get you to state what it was worth a year to support the family he had, his wife and two boys, at that time?”

“A. I suppose a family of that size, it would take in the neighborhood of \$500.”

The damages recoverable were not necessarily the entire expense of supporting the family, but the amount of the just compensation for the loss of means of support which deceased might have provided had he lived. It was error also to give plaintiff's fifth instruction with this clause contained therein: “Then the defendant is liable for all damages occasioned thereby.” This did not state accurately the measure of damages for which defendant was liable. That measure is fixed by the statute, and we have already indicated the scope of it.

The sixth instruction given for plaintiff is in conformity with the view we entertain as to the law, and was properly given. The refusal to give defendant's fourth instruction as requested, was not error, and it ought to have been refused altogether. In view of instructions which were given for plaintiff touching the rate of speed, we think defendant's fifth instruction should have been given. It was not error to refuse defendant's sixth instruction. We might not feel compelled to reverse this judgment on account of some of the errors mentioned, but those which affect the question of damages were prejudicial to the rights of defendant upon a material point, and all the errors ought to have been avoided, and doubtless will be if the cause is tried again.

The judgment is reversed and the cause remanded.

Reversed and remanded.

Neal v. County of Franklin.

AARON NEAL
V.
COUNTY OF FRANKLIN.

Champerty—Contract with County—Rescission—Practice.

1. A champertous contract is one that gives to an attorney or a third person a portion of the property sued for.

2. A board of supervisors of a county is a corporate body and can only act as such. It represents the interests of the county as to those matters wherein power is conferred by statute. The duties imposed by law are of such a nature, and the corporate body is of such a character as to make it a deliberative assembly. It has those rights which inhere in any such body, of which any one dealing with it must take notice. If for want of due deliberation ill advised action is taken, the interests of the public require that it should be permitted, at least at the same meeting, to reconsider and annul such action.

3. A demurrer to a declaration admits the facts that are well averred therein and a given defendant is estopped from afterward asserting to the contrary.

4. Pleadings are to be construed most strongly against the pleader. Where a declaration avers that a resolution of a county board was rescinded on the day of its passage without stating that any meeting intervened between its adoption and rescission, it will be assumed that the adoption and rescission occurred at the same meeting.

[Opinion filed June 21, 1892.]

IN ERROR to the Circuit Court of Franklin County; the
HON. GEORGE W. YOUNG, Judge, presiding.

Mr. C. H. LAYMAN, for plaintiff in error.

Mr. T. M. MOONEYHAM, for defendant in error.

SAMPLE, J. On September 12, 1889, the board of supervisors of Franklin County passed the following resolution:

“Resolved by the board that Aaron Neal be instructed to investigate the books of the ex-officers of Franklin County, he agreeing to do the same for twenty-five per cent of all the

money recovered and paid into the county treasury. Also, that he have all old judgments in the clerk's offices on fines and fees to collect at the same figures; said Neal agreeing to give bond to indemnify the county against any costs that may be occasioned by said investigation."

On the same day the board rescinded the foregoing resolution, whether by way of a motion to reconsider at the time of its passage or otherwise is not disclosed, and is not deemed very material. The appellant brought suit against the county based upon the said resolution.

His declaration sets up the resolution and avers his acceptance thereof; that he entered upon the performance of his duties; that he was ready, able and willing, and proposed to the board to give the bond as provided, before the rescinding order was entered; that if he had not been prevented by said order, he could and would have collected the sum of \$25,000, and made thereby the sum of \$5,000. A copy of the resolution was filed with the declaration, as the contract sued upon. A general demurrer entered to the declaration was sustained by the court, and the appellant electing to stand by his declaration, judgment was rendered against him. The appellant's position is, that the resolution, under the facts averred, was a consummated contract with the board which it had no power to recall. The position of the appellee is, as appears from the brief filed, that the appellant had not accepted the resolution, and executed his bond before the rescission; and further that the contract is champertous. This position is not well founded. The demurrer admits the facts that are well averred in the declaration. It is there expressly averred that the appellant accepted the resolution and proposed to the board to give the bond required, but was prevented by its action in rescinding the same. This the appellee admitted by its demurrer and is now estopped from asserting to the contrary. The resolution is not considered to be of a champertous character. *Torrence v. Shedd*, 112 Ill. 466. A champertous contract is one that gives to an attorney or a third person, a portion of the land or other matter sued for. In this resolution the compensation is measured merely by the amount

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recovered and paid into the county treasury. This resolution does not necessarily contemplate that there will be any litigation.

This case depends upon the power of the board to rescind the resolution under the facts as averred in the declaration. If upon the adoption of the resolution and its acceptance by Neal, with a willingness and ability on his part then and there to give the bond required, as averred, it became, *eo instanti*, a consummated contract, then a good cause of action was stated and the demurrer should have been overruled. If the resolution adopted at once partook of that character, then the board was as wanting in power to rescind the contract without cause at the same session of its passage, as it would have been at a subsequent session of the board of supervisors. It being averred in the declaration that the resolution was rescinded on the same day of its passage, without stating that any meeting intervened between its adoption and rescission—and as under the rule applicable to pleadings, they are to be construed most strongly against the pleader, for the reason that he is supposed to state the case most strongly for himself—it will be assumed that the rescission was at the same meeting as the adoption of the resolution. In this view of the effect of the pleadings on this point, the case narrows itself to this legal question. Did the board of supervisors have the power to rescind the resolution at the same meeting of its adoption? A board of supervisors is a corporate body and can only act as such. It represents the interests of the county as to those matters, wherein power is conferred by statute. The duties imposed by law are of such a nature and the corporate body is of such a character as to make it a deliberative assembly. It has, therefore, those rights which inhere in any such body, of which any one dealing with it must take notice. If for want of due deliberation, ill advised action is taken, the interests of the public require that it should be permitted, at least at the same meeting, to reconsider and annul such action. It would be intolerable that such a public corporation should be restricted from so doing. There is more reason for sustaining such right in such a body

than in such corporations as cities, where the mayor has a veto power. The inherent right of the board to rescind, may fairly rest on the theory that its deliberation as to any measure acted upon or under consideration extends over the whole period of such meeting. It has been held that "all deliberative assemblies, *during their session*, have a right to do and undo, consider and reconsider, as often as they think proper, and it is the result only which is *done*," that is, of that session. *State v. Jersey City*, 3 Dutch. 536; *State v. Foster*, 2 Halst. (N. J.) 101, cited in 2d Ed. of Dillon on Municipal Corporations, note 3 to Sec. 328. Of this law the appellant had to take notice and therefore the averment that he entered upon his duties had no force or effect. It is an averment of a fact without a right to assert it. The resolution, therefore, upon which this action is based, was not a consummated contract. There is another view that might fairly be taken of the resolution, owing to its form, which would make it a mandate or direction rather than a final and irrevocable contract, as assumed by appellant. This feature we do not deem necessary to elaborate. See 1 Dillon on Municipal Corporations, New Ed. 315, Note 1.

The demurrer was properly sustained and the judgment is affirmed.

Judgment affirmed.

SCHOOL DIRECTORS

V.

JARRETT G. WRIGHT.

Schools—Powers of Directors of—Secs. 42 and 48, Chap. 122, R. S.—Mandamus—Injunctions—Practice.

1. No appeal lies from an order in vacation denying a motion to dissolve an injunction.

2. Mandamus is a remedy at law and lies to compel the performance of a legal act and the proper expenditure of public funds.

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3. A court of chancery by its writ of injunction affords the only complete and adequate remedy to prevent the doing of an illegal act.

4. A citizen is entitled to the aid of a court of equity to prevent the illegal expenditure of public funds in the erection of a school house upon a site not lawfully selected.

5. The fact that such citizen voted at an illegal election, the result of which decided no question, can not operate to deprive him of the right to institute such proceedings.

6. A board of school directors can exercise no other powers than those expressly granted, or such as may be necessary to carry into effect a granted power.

7. In view of Sections 42 and 43, Chap. 122, R. S., a school board may not locate the site of a school house, without a selection being made by a majority vote at an election duly held, unless no locality receives such vote.

[Opinion filed June 21, 1892.]

APPEAL from the Circuit Court of Bond County; the Hon. A. S. WILDERMAN, Judge, presiding.

MESSRS. LANE & COOPER, for appellants.

MESSRS. NORTHCOTT & FRITZ, for appellee.

GREEN, P. J. Appellee filed his bill against appellant board, and John Rodecker, a contractor, praying that they be restrained and enjoined from erecting a school house upon any other site than the one selected by the majority of the legal voters of said district, voting at an election held on May 2, 1891. The writ as prayed for was issued and served on all the defendants, and on November 14, 1891, answers on their behalf were filed and a motion was entered by them to dissolve the injunction. The motion was heard in vacation by Hon. A. S. Wilderman, the judge who ordered the writ to be issued upon the bill, supported by affidavits and documentary evidence, and the answers of defendants, supported by affidavits. The court denied the motion and the board of directors took this appeal. While we understand that no appeal lies from an order in vacation denying a motion to dissolve an injunction, yet as no point is made of this character by appellee, we will give our views upon the merits of the

case. The material facts set up and relied upon by complainant to establish his right to the relief prayed for, are that at the time of filing his bill he was a tax payer and legal voter in said school district; that at an election held therein April 18, 1891, to determine the question of building a new school house, it was decided by a majority of the voters at said election to build one in said district; that on May 2, 1891 an election was held, at which it was decided by a majority of the legal voters in said district, voting at said election, that the site of the school house should be on three-fourths of an acre of land lying in a square in the S. W. corner of the N. E. $\frac{1}{4}$ of the N. E. $\frac{1}{4}$ of Section 31, in said district; that at an election held June 20, 1891, in said district, it was decided by a unanimous vote, that said board of directors be empowered and instructed to build said school house; that in pursuance of said elections, and the authority and direction given said board, they borrowed the necessary money and made a contract for the building of said school house with defendant Rodecker, and have procured and hauled the material for the same, but refuse to build it on the site selected and decided upon by the majority of the legal voters at said election of May 2, 1891, which site is suitable, desirable, conveniently and centrally located, and have decided to, and unless restrained, will at once, in violation of law, build said school house on a site selected by said board on the land of Elam, one of the members thereof. The answer admits that elections, in all respects legal, were held, and with the results as alleged; that all the requirements of the law with respect to notices, posting the same, the mode of holding the elections, canvassing the vote and declaring the result, were fully complied with; that defendant board do refuse to build said school house on the site so selected and decided upon at the election held May 2, 1891, and unless restrained by injunction will build it on the site selected by said board in Section 32 upon land belonging to said Elam. It is averred in said answer, said board may lawfully do this, for the reason that two days after the election of May 2d, it was discovered that the land on which the site then selected was located, was incumbered by a mort-

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gage securing \$500; that thereupon said board held a meeting and decided the said site was unsuitable, and called another election to select a school house site, giving due and proper notice thereof, by posting notices in three of the most public places in said district for ten days prior to said election, specifying the place it would be held, the time of opening and closing the polls, and the question to be voted upon; that at said election held on May 16th, two of the directors acted as judges and one as clerk; that two sites were voted for, one being the site already selected, the other a site on Section 32; that all the voters of said district, including complainant, voted at said election, but neither of said places received a majority of the votes cast, the result being eleven votes in favor of each place; that no place having received a majority of the votes cast at said election, said board proceeded to select and did select another and different place for a school house site, viz., the site which had received but eight votes at the election of May 2d, and no votes at that of May 16th. As additional reasons for their refusal to obey the will of the majority of said voters, expressed at the election of May 2d, it is averred the site then selected would cost too much, was not located so near the center of the district, nor so accessible to children of the district attending school as the site selected by said board. If these reasons could be a proper matter for consideration in determining the questions to be decided in this case, it is a sufficient reply to say, that before the election of May 16th the mortgage mentioned had been released, and the owner of the site selected May 2d, together with his wife, executed a good and sufficient warranty deed conveying said site to the school trustees of said township, and the release and deed were shown to defendant board. Furthermore, it appears said site was conveyed free of cost, and the deed was tendered at the hearing, and said site was quite as eligible for school purposes as that selected by defendant board. But it is not material, or pertinent to the issue, whether or not the site selected by the board upon their own motion, was more desirable and less

expensive than that fixed by the majority vote at the election held May 2, 1891.

The material questions presented by this record are these: "Was the appellee entitled to an injunction, or had he an adequate remedy at law? And, could the defendant board lawfully revoke the act of the majority of legal voters at the said election, call another election to vote again upon the question then decided, and, because at this last election there was a tie vote, proceed to select a site which had been repudiated by the legal voters at both elections? It is insisted, on behalf of appellant, that appellee had an adequate remedy at law, and also that, because he voted at the second election, he is estopped to deny the legality of appellant's action in calling it and selecting a school house site upon the failure by the majority of the voters thereat to make such selection. It is true that mandamus is a remedy at law, and it lies to compel the performance of a legal act and the proper expenditure of public funds, but to this extent only does it reach. A court of chancery, by its writ of injunction, affords the only complete and adequate remedy to prevent the doing of the illegal and wrongful acts threatened to be done by appellant, to the injury of appellee; by this writ an illegal act is prevented. By the writ of mandamus, a legal act may be required to be done; and it would be an improper application of the doctrine of estoppel to hold that, because appellee voted at an illegal election, the result of which decided no question, therefore he is not entitled to the aid of a court of equity to prevent the illegal expenditure of public funds in the erection of a school house upon a site not lawfully selected. We think the appellee was entitled to the aid of the writ, if the appellant, unless thereby restrained, would have violated the law by erecting the school house upon a site selected by said board, without lawful power or authority. The statute prescribes the duties, and defines and limits the powers of a board of school directors, in terms clear and explicit, and that body can exercise no other powers than those expressly granted, or such as may be necessary to carry into effect a granted power. *Directors v. Fogleman*, 76 Ill. 189. Sec. 48, Chap. 122, R. S.,

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among other things provides as follows: "It shall not be lawful for a board of directors to purchase or locate a school house site without a vote of the people at an election called and conducted as required by Section 42 of this act. A majority of the votes cast shall be necessary to authorize the directors to act. Provided, if no one locality shall receive a majority of all the votes cast at such election, the directors may, if in their judgment the public interests require it, proceed to select a suitable school house site, and the site so chosen by them shall, in such case, be legal and valid, the same as if it had been determined by a majority of the votes cast, and the site so selected by either of the methods above provided shall be the school house site for such district." This section prohibits the location of a school site by the board, without a selection being made by a majority vote at an election duly held. If, at such election called and held for the purpose of fixing a site, no locality receives a majority of the votes cast, then, and in that event only, is a discretionary power to act granted to the board. In this case a majority of the legal voters, at an election held May 2, 1891, did select the school house site, and this precluded the adoption of any other method by appellant to choose a site, and the money collected and materials bought to build a school house must be used in the construction of it upon the site legally fixed at said election on May 2, 1891, and not elsewhere. The appellant disregarded the provisions of this statute, and without lawful power or authority selected a site, and admit they will, unless enjoined, expend the money collected, and use the materials bought, in erecting a school house upon the site by said board, illegally selected. The injunction was properly granted to prevent such unlawful expenditure of public funds, and the motion to dissolve said injunction was properly overruled. We have thus stated briefly the views we entertain touching material points involved, although it is not necessarily required, believing it better to do so, and dismiss the appeal.

Appeal dismissed.

CITY OF EAST ST. LOUIS

v.

LORENZ BUX.

43	276
54	90
54	302
43	276
153	583

Municipal Corporations—Ordinance—License—Truckman.

In a controversy touching the violation of a municipal ordinance, requiring truckmen and other common carriers to be licensed, this court holds that the penalty provided for was intended to be imposed upon those only who carried on business within a given municipality without a license, and that defendant, who hauled goods from another city wherein he was licensed, to a depot within the boundaries of complainant, could not be considered as having been guilty of a breach of said ordinance.

[Opinion filed June 21, 1892.]

APPEAL from the Circuit Court of St. Clair County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding.

Messrs. C. B. CARROLL and AUGUST BARTHEL, for appellant.

The sole question before this court to be decided is, has the city of East St. Louis the power under the laws to impose a license tax on common carriers doing business within its limits, or is it restricted in the imposition of such license tax to its own citizens, pursuing the vocation of common carriers? We feel satisfied that the intention of the statute is to give the city a right to pass ordinances imposing a license tax on the non-resident as well as the resident carrier. The decisions of our Supreme Court all sanction the licensing of common carriers. *Gartside v. City of East St. Louis*, 43 Ill. 47; *Farwell v. City of Chicago*, 71 Ill. 269.

It is a rightful exercise of the police powers of a city to impose such license. *Cooley, Cen. Lim.*, 201; *City of Collinsville v. Cole*, 78 Ill. 114; *Joyce v. City of East St. Louis*, 77 Ill. 156.

Mr. JAMES M. HAY, for appellee.

City of East St. Louis v. Bux.

The meaning of the ordinance is, no person doing the business of transporting for hire within the city shall haul from a place within to a place without, or from a place without to a place within the city without having obtained license, as well as if he hauls from place to place within the city. *Farwell v. City of Chicago*, 71 Ill. 269. The language of that case is: "The spirit of the ordinance is, to bring the class of carriers therein named under the police regulations of the city. It is designed to operate upon those who hold themselves out as common carriers in the city for hire." The court further says: "Nor could they be compelled to carry for any one." Could Bux be compelled under his license from the city of Belleville to haul anywhere outside the city? Bux's going to the city of East St. Louis with a load for pay once or twice a year, or not as often, would be likened to the farmer in *City of Collinsville v. Cole*, 78 Ill. 272. He is not a common carrier as to East St. Louis. *City of St. Charles v. Nolle*, 51 Mo. 122.

The instruction given for appellee states the law as applicable to the case. The rule contended for by appellant would be unjust as well as most inconvenient. Parties living in East St. Louis wishing to move to Belleville, or parties living in Belleville desirous of moving to East St. Louis, would be forced to use the railways, or endeavor to find some person who was not a common carrier in either of the cities, and who would not necessarily be properly equipped for the work of moving furniture, because the traffic in that line is not sufficient to justify a common carrier in taking out a license in both cities. Besides he would have to take a license out for passing through the village of New Brighton, through which he would have to pass. This class of ordinances is upheld in the interest of the public welfare, and should receive such construction as promotes it and accommodates the public. The authorities cited sustain this view and we think the instruction given by the court below on behalf of defendant is sound and will receive the sanction of this court.

GREEN, P. J. The jury found defendant Bux not guilty of violating the city ordinance, judgment was entered on the

verdict and the city took this appeal. The complaint charged that Lorenz Bux on August 21, 1891, did run a vehicle in the city of East St. Louis without having a license, in violation of Sec. 668 of the city ordinance. This section provides that no person shall engage in or follow the occupation of transporting goods, merchandise, or other property in any vehicle, or shall keep, own or use any vehicle for the purpose of carrying goods, merchandise or other property from one place to another within the city of East St. Louis or from places within to places without, or from places without to places within the city, without having obtained a license therefor from the city, under a penalty not less than \$5 nor more than \$200 for each offense. This ordinance was enacted by virtue of the following power granted to city councils in this State: "To license, tax or regulate, hackman, drayman, omnibus drivers, carters, cabmen, porters, expressmen, and all others pursuing like occupation, and to prescribe their compensation." It is quite evident the power granted is limited to the licensing, taxing and regulating the business or vocation of common carriers within a city, and the penalty referred to in Sec. 668 is intended to be imposed upon those only who engage in, or carry on the business of common carriers within the city of East St. Louis without a license. *Farwell v. City of Chicago*, 71 Ill. 269; *City of Collinsville v. Cole*, 78 Ill. 114. And in *Joyce v. City of East St. Louis*, 77 Ill. 156, it is said in the opinion: "Under the rule of strict construction the authority to license applies to those vehicles used for hire by common carriers in the city for hire." The proof in this case fails to establish the violation charged. Bux resided in the city of Belleville, and carried on his business of common carrier there, under a license issued to him by that city. He did not engage in the business of common carrier in East St. Louis, nor keep, own, or use, any vehicle for the purpose of carrying on such business in that city, nor advertise that he was doing so. The only load hauled by him into that city, so far as disclosed by the evidence, was a load of furniture, hauled from Belleville to the depot of the Chicago & Alton Railroad Co., belonging to a resident of Belleville who was moving to Jacksonville, Illi-

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nois. The instruction given for defendant correctly stated the law, and the modification of plaintiff's fifth instruction was proper.

Judgment affirmed.

LEONARD HUNT
v
COMMISSIONERS OF HIGHWAYS.

Mandamus—Highways.

1. Monuments and landmarks must prevail as against a plat in establishing the true line of a given road.

2. The writ of mandamus should not issue where the right sought to be enforced is doubtful; and the party praying for its issuance must show a clear legal right to the remedy afforded by it, before it will be ordered.

3. Upon a petition for mandamus, the prayer being for a peremptory order commanding commissioners of highways to proceed to remove obstructions from a given highway, to use their legal power to designate the boundaries thereof by visible objects and to warn adjacent owners and occupants of land to desist from in any way obstructing the same in the future, this court declines, in view of the evidence, to interfere with the judgment denying the same.

[Opinion filed June 21, 1892.]

APPEAL from the Circuit Court of Madison County; the Hon. ALONZO S. WILDERMAN, Judge, presiding.

Mr. JOHN G. IRWIN, for appellant.

Mr. W. F. L. HADLEY, for appellees.

GREEN, P. J. Appellant filed his petition for mandamus in the Circuit Court alleging he now is, and became the owner of the N. W. $\frac{1}{4}$ of Sec. 31, T. 3 N., R. 8, W. 3d P. M.,

Madison County, in 1886, at which time and for twenty years prior thereto there was a highway which had been laid out and established, and which, according to the record of the location thereof, was sixty-six feet wide, and crossed the northwest corner of said tract of land; then set out courses and distances of alleged highway; that the only outlet from said land to market, etc., was said highway; that appellant purchased said land with the understanding that the correct location of highway was as described, and examined the record and found it to be so; that since he purchased, the commissioners have permitted the traveling public to encroach upon lands west of said tract, and to deviate from the line above described, beginning at a point northwest of said quarter section corner three-quarters to seven-eighths of a mile, and continuing to run west of the line of said highway to a point thirteen chains southward of said corner, where it returns to its true location, the line of travel having deviated at said corner so far as to cut appellant's land off from said highway, and deprive his tenants of an outlet, without passing over the land of adjacent proprietors, who refuse to permit said tenants to pass over it within the limits of the said highway, and by threats and force resist all attempts to do so, and threaten to prevent the use of said highway, and have plowed up and used the ground in said highway for farming purposes; that appellant requested the highway authorities to use their powers to restore the rights of the public to use said highway for travel, but his requests being refused, he served a written notice upon the commissioners of both townships through which the road runs, after which the commissioners of Collinsville township agreed that, so far as said highway was under their jurisdiction, they would plow furrows to designate the boundaries, and would warn land owners not to encroach, and claim to have done so, but refuse to enter any order of record defining the boundaries, or to enforce the law against those who obstruct said highway; that the commissioners of Nameoki township (defendant) have never given heed to any notice, oral or written, and have refused, and still refuse, to restore said highway, or to assist the rights of the public to

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use it, and permit it to be obstructed and encroached upon as alleged.

Prayer for peremptory order commanding defendants to proceed to remove the obstructions from said highway, to use their legal power to designate the boundaries thereof by visible objects, to warn adjacent owners and occupants of land to desist from in any way obstructing the same in the future, and to use the power and authority conferred upon them by law to enforce obedience to all its requirements as respects the right of the public to the use of said highway for highway purposes, unobstructed and for general relief. Defendants' answer admits there was a highway laid out and opened through parts of the towns of Nameoki and Collinsville, but deny it was laid out and opened so that it ran across or touched any part of said N. W. $\frac{1}{4}$ of Sec. 31; alleges said highway was established and opened in 1837, upon the line now traveled through Sec. 3, T. 3 N., R. 8, and Secs. 25 and 36, T. 3 N., R. 9, and shortly after it was opened the public began to and continued to use it as now traveled up to the present time without objection from any one, and during all the time it has been under the care of the proper road authorities, and has been worked and taken care of by the public; that owners of adjoining lands built fences along the line as then opened, and erected houses and other buildings with reference to its location as then and ever since used; that if there is any record showing the establishment of a public highway across the northwest corner of said N. W. $\frac{1}{4}$ of Sec. 31, the public have long since lost all rights therein by abandonment, for the reason that such road has never been opened to or used by the public.

That a right of way for road purposes has been obtained and used by the public for more than fifty years, as above set forth, running in the same general direction, and at no place more than one hundred and fifty feet from the line of road as claimed by the petitioners; that said road as traveled and the line, as claimed by petitioners, unite at a point about three-fourths of a mile north, and again at a point about half a mile southeasterly from said northwest corner of said N. W. $\frac{1}{4}$ of

Sec. 31, and said road as now traveled is the only one that has run in that direction through that neighborhood for more than fifty years and now furnishes an adequate and sufficiently convenient outlet for all persons having occasion to use it. Defendants deny that the public travel has been directed from the line, as claimed by the petitioner, for the reason that the public travel has never been on that line, and deny that there is any obstruction of the said road as established and used; admits occupants of adjoining lands use it for farming purposes and that they and their grantors have so used it fifty years, claiming to be owner, and deny the right of the public to use any part of said land for road purposes, and claim that a public road is established at the place where it has been used for fifty years. To this answer petitioner filed his replication alleging that said highway was laid out upon the line described in the petition, and that the same is still upon said line and has not been abandoned, nor have the petitioner or general public lost their right thereto in manner and form, etc., concluding to the country. Upon the issue thus joined, the cause was tried by the court, the writ of mandamus prayed for was denied, and judgment for costs was entered against appellant, who thereupon took this appeal. To maintain the issue on his behalf and entitle himself to the aid of the remedy prayed for, it was necessary for petitioner to prove that the highway known as the Edwardsville and St. Louis road, as located, laid out and established, crossed the northwest corner of the land owned by him and described in his petition. It is earnestly insisted on his behalf that a plat and survey introduced in evidence show the highway in question to have been located, laid out and established as alleged, and that monuments or landmarks showing the line of the road were described by witnesses, and the line thus marked out by them agrees with that shown by the plat and survey.

Hence, although monuments and landmarks must prevail as against a plat in establishing the true line of the road, yet in this case there is no conflict requiring the application of that rule. We have reached a different conclusion after examining the record, and find that appellant not only failed to prove

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the material allegation of his petition, but by the preponderance of the evidence it appears a public highway was not located on his land and the fact is undisputed that no road was ever opened or worked thereon. Witness Hadley testified he was one of the viewers duly appointed to locate and open said highway and carried one end of the chain when it was surveyed; that it was located in 1837 and opened for public travel in the same year; that no part of it was located or opened on said land of appellant, and from the time it was opened it was traveled to his knowledge on the line as located until 1866. Johnson, Wooldridge, Fetherington, Spahe and Wheeler, who lived in the vicinity of the road, testified that for a period of thirty to thirty-five years prior to their examination, the line of travel had been the same, and the road had always been west of and no nearer appellant's land than it now is, since they first knew it. Some of them mentioned the location of fences and a little cabin as landmarks, tending to show the east line of said highway as located and opened was west of appellant's land. It thus appears that the Edwardsville and St. Louis road has been opened and traveled on the same line for more than fifty years; that no part of it was ever opened upon or touched the land of appellant, and we are satisfied from the evidence it was not located thereon. Appellant was not entitled to the writ. The writ of mandamus should not issue when the right sought to be enforced is doubtful, and the party praying for its issuance must show a clear legal right to the remedy afforded by it, before it will be ordered. *People v. Weber*, 86 Ill. 283; *People v. Village of Crotty*, 93 Ill. 180, and authorities there cited; *North v. Trustees*, Ad. Sheets No. 3, Vol. 137 Ill. Rep., 296.

In *Brokaw v. Commissioners of Highways*, 130 Ill. 483, cited by appellant to support his contention that he is entitled to the writ to compel defendants to perform their duty, it is said in the opinion: "We think it was intended by the statute to impose upon the commissioners the imperative duty to remove obstructions from the public highway, and as the demurrer to the petition admits that the fence and obstructions are across an existing public highway that has been used

as such for more than twenty years, it shows a *prima facie* case for awarding the writ of mandamus, and it was error to sustain the demurrer. In the same opinion it is also said, however, the writ of mandamus ever since the revision of the statute relating thereto, is only issued in a clear case and in the discretion of the court. If, therefore, another case should arise, which is like the case of Commissioners v. People, 66 Ill. 339, where the alleged obstructions were of long standing and were maintained under a claim of right by the land owner, and is believed by the commissioners not to be within the highway, perhaps the court might, under its discretionary power, refuse the mandamus, and leave the petitioners to the remedy by indictment without he had under the provisions of Sec. 74, Road and Bridge Act of 1883, first established against the person maintaining the supposed obstruction that the *locus in quo* was in fact a part of the public highway." Under the facts in this record a case is presented in which better reasons are shown why the writ ought to have been refused than appear in Commissioners v. People, *supra*, and the trial court did not err in the order and judgment entered below. The judgment is affirmed.

Judgment affirmed.

ANDREW W. METCALFE

V.

WILLIAM DICKMAN.

Trover—Absence of Demand.

The fact being that the defendant in an action of trover was an innocent purchaser of the property involved, in good faith and for value, from one who had the physical possession of it with every *indicia* of actual ownership, proof of a demand and refusal is necessary, there being no proof of an actual conversion, in order to maintain the action.

[Opinion filed June 21, 1892.]

Metcalf v. Dickman.

APPEAL from the Circuit Court of Madison County; the Hon. ALONZO S. WILDERMAN, Judge, presiding.

Mr. ANDREW W. METCALFE, *pro se*.

Mr. T. L. GAERTNER, for appellee.

SAMPLE, J. This suit was brought by appellant to recover from appellee the value of a plow which it is claimed was unlawfully converted. The action is trover. The facts are that appellant purchased a plow and gave it to his tenant to use, with the agreement that it was to remain the property of appellant until the tenant paid for the same. The tenant after using the plow for a time sold it to appellee under a claim of ownership, at a public sale, the sale being made by an auctioneer. The appellee had no information that appellant had any claim to the plow, nor were there any circumstances arising out of the sale to put him on inquiry. The appellee was undoubtedly a purchaser in good faith and for value. Some time after the purchase, appellant requested some neighbors of appellee to ask him to come in to Edwardsville and talk the matter over, and to inform him that appellant claimed to be and was the owner of the plow. The appellee received this information but did not go to see appellant. He stated, however, to one of his neighbors who had so informed him of appellant's claim, "I don't know whether it is his plow; I bought it; if he can prove it is his he ought to come after it." On trial in the Justice and Circuit Courts, judgments were rendered in favor of appellee. The points made by appellant are that there was no conditional sale by him to the tenant, of the plow; that no demand was necessary before the bringing of the suit, and that if one had been necessary it had been made. In this connection it is proper to state that one of the parties who spoke to appellee in regard to appellant's claim was his agent in taking care of the farm or house on it, but there is no proof that appellee knew this fact. The appellee rests his defense in the argument presented to this court on the fact as claimed, that no demand was made for the

property before the suit was begun, and as we regard that position to be sustained by the law and the evidence we will briefly consider it. The appellant does not claim that the evidence on the question of demand shows more than that the appellee was requested to come and see him, and that he was informed that appellant claimed to be the owner of the plow. Neither witness who testified to having talked with appellee informed him that they were acting as agents for appellant; in fact, as they both state, they did not so regard themselves. So far as disclosed by this evidence instead of such statements being a demand or in any degree partaking of that nature, they were but the recitals of what another man had said, and the reply of appellee before quoted was a very natural one to make. It is very clear that no demand was made, nor is there any evidence to show it would have been unavailing. Was such demand necessary before bringing this suit? As shown by the evidence the appellee was an innocent purchaser of the plow in good faith and for value from one who had the physical possession of it with every *indicia* of actual ownership. This being true appellee did not acquire the possession wrongfully, and there is no proof of an actual conversion of the property by appellee. *Hayes v. Mass. L. Ins. Co.*, 125 Ill. 626. Judgment is affirmed.

Judgment affirmed.

ANDREW W. METCALFE

V.

W. P. BRADSHAW.

Partnership—Dissolution—Accounting.

In view of the evidence in the case presented, this court holds, that certain commissions received by one of two partners, were not the receipts of the firm, or earnings in which the other was entitled to any share, or for which the former could be required to account.

Metcalf v. Bradshaw.

[Opinion filed June 21, 1892.]

APPEAL from the Circuit Court of Madison County; the Hon. ALONZO S. WILDERMAN, Judge, presiding.

On August 26, 1874, Metcalfe & Bradshaw formed a partnership which continued until December 15, 1885, and was then dissolved by mutual consent, Metcalfe retaining possession of the firm books of account. By the provisions of the written articles, the parties associated themselves together for the purpose of practicing law under the firm name of Metcalfe & Bradshaw, for the term of five years. The first year Metcalfe to take two-thirds, and Bradshaw one-third. Second year Metcalfe to take three-fifths, and Bradshaw two-fifths of the receipts of the firm, and thereafter, until the dissolution of said partnership, each to take an equal share of the receipts of the firm. The expenses of the firm to be paid by each in proportion to his share of the receipts of the firm. The fourth clause is: "We, and each of us, pledge ourselves to each other not to become a candidate for any political office, so as to be involved in politics during the continuance of the firm, unless by mutual consent." The fifth clause is: "We, and each of us, do promise and agree to give our time, our talents and our strength to the prosecution of the interest of the firm." And the sixth clause provides: "Any omission to keep and observe the promises and agreements herein named and agreed upon, by either of the parties hereto, will justify the other in a dissolution of the partnership." On October 8, 1889, nearly four years after the dissolution, Metcalfe filed his bill in this cause against Bradshaw, setting up the fact of partnership and its dissolution; that business to a large amount was done on credit by said firm and remained unsettled, and no settlement of the partnership business had been made; that complainant frequently applied to defendant for a settlement and he refused to make any and had collected a large amount due and owing the firm under the partnership contract, earned by the members of said firm, and belonging to said firm, and failed to place the same in the

partnership books of account, and refuses to render to complainant any account of the partnership moneys received by him; that upon a full and true settlement of the partnership accounts, a large balance will appear to be due from defendant to complainant. Prays that an account may be taken of all the partnership dealings and transactions, and that the same may be fully adjusted, and the rights of the parties ascertained, and that defendant be decreed to pay what, if anything, shall appear upon such account to be due from him, and for further relief in the premises, etc. The answer of defendant admits the partnership and its dissolution as alleged, and that no actual settlement by an account taken was then had, the parties agreeing to a dissolution by a tacit understanding; as matters then stood pecuniarily, defendant then believing that an account stated would show a balance largely in his favor, but willing, for the sake of peace and a dissolution, to consider that each had received what he was entitled to under the articles; admits many debts were due the firm at time of dissolution, and alleges he expected to share in such outstanding debts, and that complainant carried off and retained all evidences of such indebtedness to the firm, and collected much of it, as defendant has been informed by clients from time to time; denies that he has collected one dollar of it, or received any of the collections made by complainant; denies that complainant, since the dissolution, ever called for a settlement, or pretended defendant was indebted to him on account of partnership matters, until two months since, shortly before bill was filed, he first spoke about it; that defendant then inquired what there was of their partnership matters he complained of, that defendant had not properly accounted for, and complainant replied nothing further than that during the partnership defendant had, as executor of the wills of Charles R. Bennett and John Neudecker, received commissions as such, and although not legally liable to complainant, yet, as it was done during the existence of the partnership, he ought to share with complainant, but whether he, the complainant, would ever call on defendant to account for said commissions, was a question; denies receiving any

moneys for the firm which he has failed to place on the books, or account for; alleges that he has no means of stating an account, because the memorandums and partnership books are, and ever since the dissolution have been, in complainant's possession. Replication to the answer was filed, and when the cause came on to be heard, the following stipulation in writing was entered into and filed:

"It is stipulated and agreed by and between counsel that the matters contended for by the complainant in this case are limited to the commissions involved in three certain cases, namely, in Charles R. Bennett's estate, Theodore Emmert's estate, and John Neudecker's estate, with the understanding that everything outside of these estates in the partnership has been settled by and between them."

The cause was then heard and the court found said commissions were not, by said parties, considered and treated as profits of or belonging to said firm, and that complainant is not entitled to have of and from the defendant an account thereof. The court decreed that the bill be dismissed, each party to pay his own costs. The complainant appealed and brings the record to this court for review.

Mr. JOHN G. IRWIN, for appellant.

Messrs. WISE & McNULTY, for appellee.

GREEN, P. J. By the provisions of the partnership agreement each partner became entitled to share in the receipts of the firm, less the expenses. No profits from any other source, derived by either partner, were to be shared or accounted for in a settlement between them of the partnership business. That business was the practice of the law. It was so expressed in the agreement, and it is alleged in the bill that no other articles or instrument was ever prepared and executed between the parties, but that the copartnership was carried on in pursuance of and under the said agreement up to the dissolution thereof December 15, 1885. By the terms of the stipulation under which the cause was tried, nothing was left

for the consideration of the court other than the commissions received by Bradshaw as executor of two estates and administrator of a third. If these commissions were receipts of the firm, appellant was entitled to a share thereof and to have an account from appellee, otherwise the bill was properly dismissed. Appellant contends these commissions were receipts of the firm, to a share of which he was legally entitled as a partner, and this is denied by appellee.

There is nothing in the articles of copartnership, fairly construed, supporting appellant's contention, and the acts and declarations of the parties, together with other facts and circumstances in evidence, clearly indicate the commissions were not receipts of said partnership business earned by the firm, and were not so considered and treated by the members thereof.

The Bennett estate was settled September 17, 1881, more than nine years prior to filing the bill in this case. The Emmert estate was settled June 3, 1882, more than eight years prior to filing said bill, and the Neudecker estate was finally settled December 21, 1885, and although Metcalfe knew at the times when Bradshaw took out his several letters testamentary and of administration that he had done so, and knew that he was acting in the capacities mentioned, that he had received these commissions and they amounted to several thousand dollars, yet during all these years no entry was made in the firm books of such receipts, and no demand was made by Metcalfe for any share thereof, except that Bradshaw testified Metcalfe came to him September 1, 1889, and asked him if he did not think he ought to divide the commissions in the Neudecker estate, and he, Bradshaw, said no, and that he didn't think he owed him anything; that Metcalfe then said, "I don't think you are legally liable, but morally you ought to," and that he, Bradshaw, replied, "I shall not do it;" that Metcalfe asked him a few days afterward in the court room if he would do it, and he said no; that Metcalfe then said, "I will sue you," and he replied, "Go ahead." This testimony of Bradshaw was not contradicted and he denies that the firm had any claims in or to these commissions. We refrain in this

connection from discussing the method adopted by appellant to procure the selection of appellee as executor of Neudecker, together with the motive that he says prompted him to accomplish such selection, and the contradiction of his testimony by Eaton, and the effect of his acting as attorney for the estates to defeat his claim to any part of the said commissions, and hold that, independent of these matters, the facts established by the evidence contradict appellant's theory and defeat his claim. Bradshaw took no unfair advantage in accepting the positions of executor and administrator. It was not done secretly but openly, with the knowledge and consent of his partner. Acting in these capacities did not conflict with the interests of the firm or interfere with its business, as we understand the evidence. The fourth, fifth and sixth clauses of the partnership agreement, quoted in the statement of the case, do not prohibit either partner from doing other business, except neither is to become a candidate for office unless by mutual consent, and each is to give his time, talents and strength to the prosecution of the interest of the firm, and the violation of these provisions by either party will justify the dissolution at the instance of the other party. In the absence of any inhibition forbidding it, Bradshaw had the right to act as executor and administrator and receive and appropriate to his own use said commissions. In Parsons on Partnership, Sec. 6, Par. 2, Chap. 7, it is said, "It is probably not true in fact that the majority of partners confine themselves absolutely and exclusively to partnership business, or that it is expected or necessary that they should."

This is coupled with the condition that one partner can not, without the consent of the others, embark in a business that manifestly conflicts with the interests of the firm, and he can not clandestinely use the partnership property or funds for his own private advantage without being required to account to his copartners for the property or funds thus used, and for the profits made. 5 Wait's Actions and Defenses, 125.

The same doctrine above stated is announced in cases cited by appellee. *Wheeler v. Sage*, 1 Wall. (U. S.) 628, and other authorities.

Applying the law as we believe it to be, to the evidence disclosed by this record, we reach the same conclusion arrived at by the trial court, that the commissions were not the receipts of the firm, or earnings in which complainant was entitled to any share, or for which defendant could be required to account, and the bill was properly dismissed.

The decree of the Circuit Court is therefore affirmed.

Decree affirmed.

TOLEDO, ST. LOUIS & KANSAS CITY RAILROAD COM-
PANY

V.

ROSANNA BAILEY, ADMINISTRATRIX.

Master and Servant—Negligence of Master—Machinery—Defects in—Notice.

1. It is a question of fact for the jury to determine in a personal injury case whether or not the person injured knew at the time he went to work at the machine at which he was working when killed that it was defective and unsafe, and with such knowledge, voluntarily incurred the peril of operating it, and whether or not he was in the exercise of ordinary care for his own safety at the time of the injury.

2. In such case, evidence going to show that the defendant's employes regarded the same to be unsafe, is admissible.

3. In an action brought by the administratrix of a railroad employe to recover for his death, the same being alleged to have been caused through its negligence in placing him at work with a defective engine, this court declines, in view of the evidence, to interfere with the judgment for the plaintiff.

4. The antecedents of a witness are a proper subject-matter of inquiry upon cross-examination, and a ruling allowing such cross-examination, but disallowing undue prolixity, is proper.

[Opinion filed June 21, 1892.]

APPEAL from the Circuit Court of St. Clair County; the
Hon. B. R. BURROUGHS, Judge, presiding.

43	292
145	150
43	292
54	214
43	292
189	308

T., St. L. & K. C. R. R. Co. v. Bailey.

Messrs. H. A. NEAL, MESSICK & RHOADS, and CLARENCE BROWN, for appellant.

Messrs. JAMES M. HAY and B. H. CANBY, for appellee.

GREEN, P. J. This action on the case was brought by the administratrix of the deceased Barrett's estate under the statute to recover damages for his death alleged to have resulted from appellant's negligence. A verdict against appellant was returned for \$3,000 damages. Judgment for this sum and costs of suit was entered, and the defendant took this appeal. The negligence charged in plaintiff's declaration is, "that defendant carelessly and negligently furnished an engine that was old, worn out, insecure and wholly unfit for use; that the boiler was defective, the iron being weak and much deteriorated in strength; that the boiler was corroded and crystalized about the seams, and in other places; the flues therein were defective and in bad and unsafe condition, and the boiler leaky; that the rods in said boiler were old, rusty, and some of them broken, and the nuts gone; that the safety valves regulating the pressure of steam on said boiler and the escape thereof were out of order, and would not perform their functions, and the steam gauge on said locomotive was defective and would not register and indicate the amount of steam pressure on said boiler; that while Michael Barrett was driving said engine with all due care, said engine by reason of said defects and imperfections exploded, killing said Barrett; that he left him surviving two daughters under the age of eighteen years. The deceased, Michael Barrett, during the three or four months next preceding his death was employed by appellant as night hostler; his duty was to attend to the engines, put them in the round house and have them ready when called for, so far as firing up and putting water in the boiler was concerned. In the early part of September, 1890, his employment was changed to that of machinist helper, and if needed it was his duty to act as an extra engineer. On the 13th of said month, Neff, the regular engineer in charge of appellant's engine No. 95, and running it during the morning of that day,

did not wish to work in the afternoon and so informed Riegel, the foreman in charge of engineers. Riegel thereupon directed Barrett to take said engine and run it during the afternoon. In obedience to this order the latter took the engine after dinner, ran it for about an hour and a half, when the boiler exploded, and thereby Barrett was so injured that death resulted. Barrett left him surviving two daughters, both minors, dependent upon him for support. Several grounds for reversal are presented and insisted upon on behalf of appellant. First, that the proof does not establish the following facts essential to the maintenance of this suit, viz.: The defective condition of the boiler and appliances substantially as averred, and injury resulting by reason thereof. Notice to defendant, actual or constructive, of such defective condition, and that deceased was in the exercise of ordinary care as averred. If the jury believed the testimony of McAdoo, Shaw, Harrigan, James Clavin, Michael Clavin, Eugene Wright and Charles McGlynn, the proof was sufficient to support the material averments that engine No. 95 was insecure, much worn, and in bad repair, the boiler leaky, that the safety valves regulating the steam pressure and designed to let the steam escape when it exceeded the amount that might be safely employed would not work and were practically useless, the steam gauge was out of order, many of the stay bolts attached to the boiler had been broken off for quite a length of time, the injectors were in bad order and would not inject water into the boiler; in short, the evidence on behalf of plaintiff clearly established the fact that defendant was guilty of culpable negligence in furnishing an engine, boiler and appliances unsafe and unfit for use and directing the deceased to operate the same. If in connection with this evidence the evidence for the defendant is considered, a conflict arises, but in our judgment even then the weight of the testimony supports the charge of negligence as averred. There is also evidence to show both constructive and actual notice to defendant of the defective condition of engine No. 95. It had been in such condition during so long a time that Riegel, defendant's servant, whose duty it was to examine it and look after machinery

and the repair thereof, must have known, had he exercised ordinary care, that it was unsafe and unfit for use. He was also notified of these defects, if the testimony of several witnesses for plaintiff is to be believed. It was a question of fact for the jury to determine from the evidence whether or not the deceased knew at the time he took the engine in obedience to Reigel's order that it was defective and unsafe, and with such knowledge voluntarily incurred the peril of operating it, and whether or not he was in the exercise of ordinary care for his own safety at the time he was injured. It is insisted on behalf of appellant that such knowledge by deceased must be inferred from the fact he worked as night hostler, or as we have before stated, and also operated the engine on several occasions, and furthermore, because he admitted such knowledge by saying to Shaw a few days before the explosion, the engine was unsafe because the stop valve (safety valve) was out of order and it would blow up. The duties of deceased as night hostler did not require him to inspect the boiler and appliances and see that they were safe and fit for use, nor in the performance of such duties would he necessarily discover all the defects in the same. The evidence does not show very satisfactorily how often he had operated the engine, or to what extent, before he was killed, and the jury could fairly infer he acquired but little knowledge of its defect in that manner. His remark to witness Shaw a short time before his death also indicated the only defects he was aware of were in the safety valve and steam gauge, and after he had said this and before he took charge of the engine by Reigel's order, Shaw informed him he had remedied these defects the best he could. Deceased had a right to rely on this information, and assume that the engine furnished him was in reasonably safe and fit condition for use. The jury could properly find from the evidence that deceased was not guilty of contributory negligence.

We think also the evidence justifies the conclusion that by reason of the defective safety valve, steam gauge, stay bolts and boiler, the explosion occurred and the death of Barrett resulted. It is said the court erred in admitting the testimony

of Shaw to prove that the employes of defendant in the yard regarded this engine unsafe, and that it was so reputed to be among them. We suppose this evidence was admitted to show the defective and dangerous condition was so notorious, that defendant's servants having charge of its engines and the keeping of the same in repair knew, or in the exercise of reasonable diligence and precaution ought to have known, that engine No. 95 was not safe. In cases of this character such evidence has been held to be relevant and proper. *C. & A. R. R. Co. v. Shannon*, 43 Ill. 343. Error is assigned also for the ruling of the court in cross-examination of plaintiff's witness, James Clavin. We find no reversible error in this. The antecedents of a witness are a proper subject-matter of inquiry on his cross-examination and the ruling of the court below did not unduly abridge such inquiry, but merely forbids needless prolixity. No other of the objections made on behalf of appellant to the admission of evidence are tenable. The first instruction given on behalf of plaintiff is complained of; by it the jury were informed that if they believed from the evidence plaintiff had proven all the material averments of her declaration by a preponderance of the evidence, they should render a verdict for plaintiff; the criticism is that this instruction leaves the jury to determine what are the material averments in the declaration, and thereby decide a question of law. The jury were not misled or misdirected by this instruction. It was given together with six instructions for defendant, fully informing the jury what the material averments were and the necessity of proving all of them before plaintiff would be entitled to recover, and these six instructions state fully and most favorably every legal principle applicable to the facts contained in defendant's refused instructions. The judgment is affirmed.

Judgment affirmed.

LOUISVILLE, EVANSVILLE & ST. LOUIS CONSOLIDATED
RAILROAD COMPANY

43 297
56 180

v.

ISAAC W. DULANEY.

Railroads—Negligence of—Injury to Stock—Failure to Fence—Hog—Contributory Negligence—Evidence.

1. The mere fact that the owner of stock allowed the same to run at large, contrary to law, and it is injured by a railroad train upon an unfenced right of way, the law requiring the same to be fenced, will not bar a recovery, where the company's servants failed to use reasonable care and precaution, under all the circumstances of the case, to avoid the injury.

2. In the case presented, this court holds that the evidence justified the jury in finding defendant's engineer guilty of such gross and wilful negligence as warranted a verdict for the plaintiff, notwithstanding the fact that he allowed his animal to run at large.

3. This court holds as erroneous, the failure to exclude a remark made by the plaintiff while testifying, its substance being that domestic animals were allowed to run at large in his township, there being no stock law, for the reason that it was not the best evidence to prove the fact.

[Opinion filed June 21, 1892.]

APPEAL from the Circuit Court of Jefferson County; the Hon. E. D. YOUNGBLOOD, Judge, presiding.

Mr. C. H. PATTON, for appellant.

Mr. G. B. LEONARD, for appellee.

GREEN, P. J. This suit was commenced by appellee before a justice of the peace to recover from appellant the value of a hog, whose death resulted from being struck by the engine of appellant. The cause was tried in the Circuit Court on appeal from the justice court; a verdict in favor of plaintiff for twenty dollars damages was returned; defendant's motion for a new trial was overruled, judgment was entered on the verdict, and defendant took this appeal. It is conceded that the

animal belonged to appellee and was suffered to run at large; that it was struck by appellant's engine, and so injured that it could not recover, and was then killed by the section hands employed by appellant; that appellee was damaged at least ten dollars by its loss, and that ten dollars is a reasonable fee for the services of his attorney in trying the cause. But on behalf of appellant it is insisted the court erred in not excluding this remark made by appellee while testifying on his own behalf: "There is one other thing I might state. Domestic animals are allowed to run at large in our township; we have no stock law." This was not the best evidence to prove that fact, and it was error to admit it, but in the view we take of the case we ought not to reverse the judgment on this account. Under the other facts proven, the plaintiff's right to recover would not be defeated, even if the statute had not been suspended and animals could not lawfully run at large in said township. It is next urged on behalf of appellant that appellee was guilty of such contributory negligence in suffering his hog to run at large, as to bar his right to recover, and *T. W. & W. Ry. Co. v. Barlow*, 71 Ill. 640; *C. & A. R. R. Co. v. Rice*, 71 Ill. 567; *T. W. & W. Ry. Co. v. Spangler*, 71 Ill. 568; *Ewing v. C. & A. R. R. Co.*, 72 Ill. 25, and *P. P. & J. R. R. Co. v. Champ*, 75 Ill. 577, are cited in support of this contention. In the first case it is said the animal was running at large in violation of the statute and was unlawfully upon defendant's right of way; that in such case defendant was not in general liable, unless its servants after they discovered the animal was in danger, might by the exercise of proper care have prevented the injury. In the next case the facts were that a team of horses ran away and got on the railroad track within the limits of an incorporated town at a place where the defendant was not required to fence, and were injured without negligence of its servants in charge of its train, and no evidence was introduced on the question of the value of the horses. For these reasons judgment was reversed. In the fourth case it was held the injury occurred in a village, at a place defendant was not bound to fence or maintain cattle guards. In the next case it is held, the fact

that the owner of stock permits it to run at large in violation of the statute does not relieve a railroad company from the duty to fence its road or from liability for stock injured in consequence of its failure to do so. That it is not sufficient to charge plaintiff with contributory negligence in a suit against a railroad for injury to stock, to show that the owner permitted it to run at large. But it must appear he did so under such circumstances that the natural and probable consequence would be that the stock would go on the track and be injured. It is a question of fact for the jury.

In the last case cited it was held that although plaintiff was guilty of contributory negligence by his unlawful act in turning his horse upon the common, when he knew it could get on defendant's railroad track, this fact did not relieve defendant from the duty of exercising proper care and reasonable precaution to avoid the accident. On this branch of the case, on behalf of appellee, some of the cases cited by appellant are relied upon to support the converse of said contention, and *Cairo, etc., Ry. Co. v. Woolsey*, 85 Ill. 370; *T. P. & W. Ry. Co. v. Logan*, 71 Ill. 191, and *P. R. I. & St. L. R. R. Co. v. Irish*, 72 Ill. 404, are also cited. These cases are all in point, and in the last one it is held, the law prohibiting domestic animals from running at large, in force October 1, 1872, does not repeal or nullify any of the provisions of the act of February 14, 1855, requiring railroad companies to fence their roads; and in suits to recover for stock killed, it is a question of fact for the jury to determine from all the circumstances in evidence, whether the act of the owner in permitting his animal to run at large, in violation of the law, is contributory negligence. We understand the rule to be, as announced in such of these cases cited as are pertinent here, that the mere fact that the owner of stock injured by a railroad train, and which entered the right of way at a place the road was required to fence, and was not fenced, suffers said stock to run at large contrary to law, does not bar his right to recover, but other facts and circumstances must be shown; and furthermore, it must appear the defendant's servants used reasonable care and precaution, under all the

circumstances surrounding them at the time of the injury, to avoid the accident, before the owner can be found guilty of such contributory negligence as would defeat his suit. We are satisfied, after an examination of the record, the jury properly found against appellant's defense of contributory negligence. In our judgment the evidence justified the jury in finding defendant's engineer guilty of such gross and wilful negligence, resulting in the injury complained of, as warranted a verdict for appellee, notwithstanding the fact he permitted his animal to run at large.

It appears from the evidence that appellant's train was running east through the village of Bluford at a speed of twenty-five or thirty miles an hour, toward a highway crossing distant about a quarter of a mile from the platform of the village depot; that for this distance the track was straight and the hog was seen walking on it, east of the crossing, by persons at or near the platform, as the train passed them. The engineer could then have seen the animal on the track had he looked ahead, as it was his duty to do. Instead of doing this, he was looking around in another direction as the train passed the depot, and it had run within sixty feet of the hog before he saw it. It was then too late to stop the train and avoid the accident. He testified to this and no reason is shown for his omission to perform a duty so necessary and important. This wilful negligence and the neglect of appellant to fence its road as required by law, caused the injury complained of and damage to appellee, for which appellant was legally liable. The allowance of the attorney's fee is objected to for the alleged reason that the injury was not the result of the failure to fence. The greater weight of evidence shows the animal was struck and injured outside of the village limits, east of said crossing, at a place where the law required appellant to fence its road. It further appears there was no fence maintained for some distance each side of the crossing along the right of way, and at the time of the injury there was snow on the crossing, which had not been disturbed, and the tracks of the hog were found only in the railroad track each side of and over the crossing, indicating that the animal had entered

Davis v. Mann.

the right of way at a place west of the crossing, where, by law, appellant was required to fence but had not done so, and by reason of this neglect the animal got upon the railroad track and was struck and injured by the engine of appellant. Instructions numbered one, two, three and five, which the court was requested to give on behalf of defendant, were properly refused. Number one omits any mention of the engineer's neglect to look ahead of his train, and would have misled the jury. Number two and number three announced incorrect propositions of law under the facts proven. Number four merely stated the fact that no legal evidence had been introduced showing that plaintiff's hog was lawfully running at large. We hold it to be immaterial in this case whether or not the animal was lawfully permitted to run at large, hence it was not error to refuse this instruction. Instructions were given for defendant which do not appear in the abstract, covering all the material points contained in the refused instruction number five, and more favorable to appellant than it was entitled to. We find no error requiring the reversal of this judgment and it is affirmed.

Judgment affirmed.

S. I. DAVIS

V.

JOHN MANN AND HENRY MANN.

Negotiable Instruments — Note — Limitations — Payments — Practice — Principal and Surety.

1. A new trial should not be granted upon the ground of newly discovered evidence, the same being merely cumulative in character.
2. A promise by a surety on a note to pay the same in whole or in part must be in writing in order to take it out of the statute of limitations.
3. If part payment is relied upon it only operates as to the one making or contributing thereto.

[Opinion filed June 21, 1892.]

APPEAL from the Circuit Court of Perry County; the Hon. BENJAMIN W. POPE, Judge, presiding.

43	301
55	134

Mr. S. H. REID, for appellant.

Messrs. FOUNTAIN & SPILMAN, for appellees.

SAMPLE, J. This suit was brought by the appellant on a note given by Henry Mann, as principal, and John Mann, as surety, of date April 14, 1875, for the sum of \$200, due six months after date. Henry Mann was defaulted. John Mann, the surety, pleaded the statute of limitations. Issue was joined on this plea and trial had before a jury, who, after the evidence was all heard, were instructed to find for the defendant. It is of this instruction and the verdict thereunder of which the appellant complains.

The evidence, in brief, was to the effect that the principal on the note, Henry Mann, had made two payments thereon, which, as to him, took the note out of the statute of limitations; that John Mann, the surety, had neither made, induced nor contributed to either payment, and neither had he made any promise in writing to pay the note or any part thereof. If a promise is relied upon to take the note out of the statute of limitations, under our statute, it must be in writing.

There was not a scintilla of evidence to show such a promise. If payment is relied upon, then it only operates as to the one making or contributing to the payment. This question has been exhaustively considered in the case of *Kallenbach v. Dickinson*, 100 Ill. 427, which, in its facts, is on "all fours" with the one now in hand. The court did not commit error by instructing the jury to find for the defendant, as there was no evidence upon which a verdict for the plaintiff could have been sustained. There was no error in refusing to grant a new trial on the strength of the newly discovered evidence. It would only have been cumulative in its effect and for the reasons above stated, therefore could not have changed the result. The judgment is affirmed.

Judgment affirmed.

Kingman & Co. v. Decker.

KINGMAN & Co.
v.
HENRY J. DECKER.

48	363
106	578

Sales—Warranty—Breach—Principal and Surety—Jurisdiction.

1. A plea in abatement to the jurisdiction of the court by a defendant in a given case, made after full appearance by him, is unavailing.
2. No action can be maintained by a surety on a warranty to his principal.
3. In an action brought to recover for an alleged breach of warranty of certain harvesters, this court holds, in view of the evidence, that the judgment for the plaintiff can not stand.

[Opinion filed June 21, 1892.]

APPEAL from the Circuit Court of St. Clair County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding.

Messrs. TURNER & HOLDER, for appellant.

A defendant must be sued in the county where he resides or may be found, except in local actions or where there is more than one defendant, when the suit may be brought in any county where one resides. Sec. 2, Practice Act.

An incorporated company may be served with process by leaving a copy thereof with its president, if he can be found in the county in which the suit is brought; if he shall not be found in the county, then by leaving a copy of the process with any clerk, secretary, superintendent, general agent, cashier, principal, director, engineer, conductor, station agent, or any agent of said company found in the county. Sec. 5 of Practice Act.

A mere traveling salesman is not such an agent as is contemplated in the statute.

An agent is one who undertakes to transact some business or to manage some affair for another, by the authority and on account of the latter, and to render an account of it. A factor, broker or attorney is an agent, yet it would not be

contended for a moment that service on either a factor, broker or attorney would be a good service under the statute.

Service of process upon an agent appointed by a corporation, whose business is simply to make sales, will not give the court jurisdiction of the corporation, such person not being an agent of the corporation in the sense of the statute. *The Union Pac. R. Co. v. Miller*, 87 Ill. 45; *Mid. Pac. R. Co. v. McDermid*, 91 Id. 170.

The court erred in sustaining demurrer to plea in abatement.

The right to an action upon a breach of warranty is personal to the buyer. Therefore, one who is surety for the price can not maintain an action on the warranty to the buyer. *Benj. on Sales*, 1156 and note; *Marsh v. Low*, 55 Ind. 271; *Barbour on Parties*, 40.

Messrs. JAMES M. HAY and CHARLES P. KNISPEN, for appellee.

1. The authorities cited by appellant for the purpose of showing want of proper service do not apply; these were cases of foreign corporations not doing business in this State, nor having property in the State, nor an agent residing in the State. In this case the service was pursuant to the statute. But for another reason the demurrer to the plea was properly sustained. A general appearance was entered by defendants on May 21, 1888, by filing a motion for a list of particulars. The plea in abatement was not filed until nearly a year afterward, viz., May 4, 1889. By an ingenious arrangement appellant's counsel changed the appearance on the face of record. The papers copied into the record show conclusively the true facts, both in the captions and the file marks of the respective papers, viz.: Motion, May term, 1888; plea, May term, 1889.

After a defendant interposes a motion or enters a general appearance, he can not plead in abatement or to the jurisdiction. *Holloway v. Freeman*, 22 Ill. 197; *Easton v. Altum*, 1 Scam. 250; *Cook v. Yarwood*, 41 Ill. 115; *Vanderbilt v. Johnson*, 3 Scam. 48; *Ellis v. Sisson*, 96 Ill. 105.

2. The letters were properly introduced in evidence. They

were the basis of the new agreement made between the parties hereto, and if not shown us or delivered to us, how could we have acted upon the propositions of appellant?

The doctrine of privileged communications does not extend to and excuse an attorney from testifying in regard to an agreement for settlement made by him with the opposite party, at the request of his client. *Thayer v. McEwen*, 4 Ill. App. 416.

3. The admission of Knispel's evidence can not be assigned for error. The court may, in its discretion, at any time before argument, permit either party to introduce evidence in chief, nor can error be assigned on the admission of such evidence. *C. F. R. & B. Co. v. Jameson*, 48 Ill. 281; *Wilborn v. Odell*, 29 Ill. 456; *Manzy v. Kinzel*, 19 Ill. App. 571.

4. It is a general and well established rule that an action for damages lies in every case of a breach of promise made by one man to another for a good and valuable consideration. *Benj. on Sales*, 2d Ed., Sec. 897.

The case was tried under the stipulation, etc., that the plaintiff may introduce in evidence under his declaration any evidence that might be introduced if properly averred. Appellant left out of the abstract the important words "that might be introduced." Under this stipulation we certainly proved clearly a distinct and separate contract with Henry J. Decker, for a good and valuable consideration, paid by Henry J. Decker, a substitution as we may say, of Henry J. for Jacob, payment by Henry J. Decker of the consideration, and breach of contract by Kingman & Co.

GREEN, P. J. Appellee brought this suit against appellant to recover damages for an alleged breach of warranty of two Empire harvesters. The declaration as finally amended consisted of three special counts, and the consolidated common counts. The first count charged a breach of warranty to Jacob Decker, as purchaser and maker of the note, for the price of said machine, which note, it is averred, plaintiff guaranteed. The second count charged a breach of warranty to Henry Decker, made in consideration of his guaranty.

And the third special count avers that plaintiff bought the machines, and the defendant promised the same should be good machines, and would each cut from ten to twelve acres of wheat a day, when properly managed, and aver they were delivered to plaintiff and were not good machines, and would not cut from ten to twelve acres of wheat a day, but were bad and unmerchantable, whereby plaintiff lost the benefit of selling the same, and expended large sums in storing the same, and other damages sustained. A plea of general issue was interposed, and a stipulation thereunder as to the admission of evidence. The cause was tried by the court, and a finding and judgment for plaintiff resulted for \$693.30 damages and costs of suit. To reverse the judgment this appeal was taken by defendant. On the 21st day of May, 1888, defendant appeared by its attorney and entered a motion for a rule on plaintiff to file a bill of particulars, and after thus submitting itself to the jurisdiction of the court, on the 4th day of May, 1899, defendant filed a plea in abatement to the jurisdiction, averring defendant was a non-resident of St. Clair County, and the person upon whom the writ was served, as agent of defendant, was also a non-resident; was not located at any point in said county as agent, but was a traveling salesman, etc. This plea was properly stricken from the files; it was not interposed in apt time, but after a full appearance by defendant. Hence there was no error in this ruling of the court. Plaintiff could not recover at law for the breach of warranty set up in the first count of the declaration as therein averred; it was a warranty to Jacob Decker for a breach of which he, and not his surety, could maintain an action. Nor was there any evidence tending to support plaintiff's right to recover under either the third or fourth counts. Hence, the only question for us to determine, is whether plaintiff was entitled to recover said judgment under the second count of the declaration. It appears that Jacob Decker, under a contract with defendant, purchased the two machines and other goods, which were delivered to him, and on March 2, 1883, his indebtedness to plaintiff was \$1,432.93, in addition to the purchase price of said two machines. For all this debt

the plaintiff was then liable to Kingman & Co., as a guarantor of Jacob, and the claim was placed in the hands of attorneys for collection.

The two machines were then in the possession of Jacob Decker. Negotiations for an amicable settlement were entered upon between the attorneys of Henry Decker and the attorney of Kingman & Co., resulting in the acceptance of a written proposition for settlement, addressed to Jacob Decker, made by Kingman & Co. on March 19, 1883, which in substance provided if the past due indebtedness of Jacob Decker should be paid, Kingman & Co. would extend the provisions of the warranty as entered into with him for the season of 1882, upon the two Empire harvesters, to cover the season of 1883, and that when notified, as called for by the warranty, to render assistance in making the machines fill the warranty, and in case Kingman & Co. failed to make them fill the warranty, Jacob Decker rendering friendly assistance, agreed to take them back and credit \$232.50 each. On March 24, 1883, Henry Decker paid the past due indebtedness of \$1,432.93 and guaranteed Jacob's note to appellant, dated August 31, 1882, for \$430, due October 1, 1888, and gave appellant his individual note for \$35, due August 1, 1883, which last note he paid. The note for \$430 was assigned before maturity to one Morris, who sued thereon and recovered a judgment, which appellee paid. At the time the proposition was accepted, and the settlement made, Jacob Decker had forfeited the warranty on the two Empire harvesters, and he and appellee, as his surety, were then liable to appellant for the price thereof; no compromise was required to fix that liability, and there existed no inducement for changing the terms of the warranty already agreed upon to the disadvantage of appellant. This fact and the very terms of the accepted proposition, negative the idea that a warranty other or different from that provided for in the contract and printed instructions was intended to be extended. If it be held then, as contended for by appellee, that the evidence shows he was to have the benefit of the extension of warranty as provided for in the proposition addressed to Jacob Decker, then the terms of the original contract, dated November 14, 1881, the

printed instructions made a part thereof, and the printed warranty, must be referred to for the purpose of determining what the warranty was, and upon what conditions and under what restrictions Jacob would have been entitled to the benefit of it. The evident meaning and purpose of the contract was, that machines sold and delivered by Kingman & Co. to Jacob were to be sold in the course of trade by him. He became a purchaser, and at the same time, in consideration of the discount on the price and privilege of selling, accepted an agency and agreed to sell the machines of appellant within the limits of a defined territory and not elsewhere. This is shown by the contract itself and by the written guaranty executed by appellee, which commences as follows:

“In consideration that Kingman & Co., of Peoria, Illinois, do or shall appoint Jacob Decker their agent at Mascoutah, to sell their goods or to sell goods shipped or sent to him at Mascoutah and that they do agree to sell, send or deliver to him goods from time to time as they, the said Kingman & Co., may desire.” The provisions relating to and governing the warranty are clauses seven and eight of the contract and clause four of the printed instructions. “Clause seven” provides that Jacob Decker agrees to see that all machines are settled for when delivered, and that all machines are properly set up and operated as per directions when started to work, and to be governed by the instructions on the back of the contract which are made a part of the sale. By “clause eight” it is agreed if Jacob Decker shall fail to take a written order or shall deliver any machine or part of a machine to any customer or other person before it is fully settled for, said Decker shall account to Kingman & Co. on demand for the full price of such machine and shall waive all claims under warranty on any machine so delivered. “Clause four” of said instructions is as follows: “You will please take a written order for each machine you sell, and give the purchaser a printed warranty which shall be sufficient guarantee that the machine will work as represented by us. But if you fail to take a written order and give the purchaser our printed warranty showing just what the machine is warranted to do, you thereby forfeit our warranty to you. All machines

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must be settled for by cash or note when delivered to purchaser. This is the printed warranty. "Warranty. All machines are warranted to be well built, of good material and capable of cutting, if properly managed, from ten to fifteen acres per day. If, on starting a machine, it should in any way prove defective and not work well, the purchaser shall give prompt notice to the agent of whom he purchased it and allow time for a person to be sent to put it in order. If it can not then be made to do good work the defective part will be replaced or a perfect machine will be furnished in its stead; then if it does not work well and the fault is in the machine, it may be returned to place where received and the payment of money and notes returned. Keeping the machine during harvest, whether kept in use or not, without giving notice as above, shall be deemed conclusive evidence that the machine fills the warranty." It appears to us that by a fair construction of the original contract and documents connected therewith and part thereof, it was intended and agreed by the parties thereto that a sale by Decker of a machine upon the written order of the purchaser and delivery to the latter of the printed warranty, an actual test of the machine after notice as provided in the warranty and a failure of the machine to work well must be shown before a breach of warranty could be claimed to have occurred. If Henry Decker has succeeded to the rights of Jacob as to the warranty by reason of his acceptance of said proposition and payment of the debts, the same conditions precedent must be shown; and as it appears no sale, as required, of either of the machines, was made after the time it is claimed they became appellee's property by such acceptance and payment, nor any notice given and test made as required by the warranty, appellee was not entitled to recover. The judgment is reversed and the cause remanded.

Reversed and remanded.

CROWN COAL COMPANY

V.

ABRAHAM HILES.

Master and Servant—Negligence of Master—Improper Appliance—Personal Injuries.

Where an employe suffers personal injury through the negligent construction of an appliance he is obliged to use, no notice of its condition to the employer is necessary in order to warrant a recovery.

[Opinion filed June 21, 1892.]

APPEAL from the Circuit Court of St. Clair County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding.

Mr. R. W. ROPIEQUET, for appellant.

Messrs. DILL & SCHAEFER, for appellee.

SAMPLE, J. Appellee, while shoveling slack coal under a coal-chute of appellant, was injured by a lump of coal which was precipitated over the side of the chute as the coal was dumped thereon. The negligence averred in the declaration is the improper construction of the chute, with the knowledge of appellant of its dangerous condition, and the ignorance of the appellee of such condition. It appears from the evidence that appellee was put at work under the chute the morning of the day of the accident, and was not informed of any danger attending his work there; that it was customary for the dumper, when the coal was emptied on the chute, to give warning by calling out, "Look out below;" that this warning was given at the time of the accident to appellee, but that he did not hear it; that this warning was given, not so much for the purpose of warning persons below of danger, as that they might get out of the way of the slack and little lumps that screened through and fell below; that the south side of the chute, over which the lump of coal that struck appellee, weighing thirty or forty pounds, was thrown, was

only sixteen or seventeen inches high; that this was not of sufficient height is testified to by the mine inspector of the county of St. Clair, in which the appellant's mine is located, as well as by other witnesses; that lumps of coal occasionally fell over the chute on the south side, which is lower than the north side, is proven by one of the dumpers and not disputed by any one; there is evidence tending to show that the appellee did not work on that part of the slack coal pile as instructed, and that if he had, he would not have been in the way of the lump of coal that struck him, although this evidence on the part of the appellant is contradicted by the appellee. The jury rendered a verdict in favor of appellee for \$250 damages, which was sustained by the court. The errors assigned that are argued are: That the verdict was contrary to the evidence, and that the court erred in modifying two instructions given for appellant. The evidence fully sustains the charge of negligence in the construction of the coal-chute, in which case it is not necessary to prove notice of its dangerous condition. *Alexander v. Town of Mt. Sterling*, 71 Ill. 369. In this case, however, it is considered that the appellant knew, by its officers, that lumps of coal did occasionally fall over the low side of the chute. The appellee testified that he did not know of such fact, and there is no evidence to show that he did. The fact that he had helped sink the shaft and had worked about the mine for a time, does not of itself prove, as against his positive statement, that he knew the condition of the chute, or that lumps of coal were liable to fall over the low side. There is no evidence tending to show that he had assisted in the construction of the chute, or had worked under the chute before the day of the accident. No one had informed him that lumps of coal occasionally fell over the side of the chute and to be on the lookout, and no lump of coal had fallen the day he worked there, so far as he knew, other than the one that injured him. The evidence does not show that his negligence contributed to the injury.

There was no error in the modification of the appellant's instructions. The judgment is affirmed.

Judgment affirmed.

JOSEPH MEYER

V.

SOPHIA BUTTERBRODT.

Dram Shops—Loss of Means of Support—Death—Remote and Proximate Cause—Drowning.

1. Intoxication will be considered the proximate cause of a person's death, although a new force or independent act is the immediate cause thereof, where such intoxication puts the person killed in the way of the operation of such force or act.

2. In the case presented, this court holds that the husband of plaintiff came to his death from drowning by reason of his intoxicated condition.

[Opinion filed June 21, 1892.]

APPEAL from the Circuit Court of Randolph County; the Hon. GEORGE W. WALL, Judge, presiding.

Mr. H. CLAY HORNER, for appellant.

Mr. W. M. SCHUWERK, for appellee.

The following statutes, providing for damages for injuries resulting from the sale of intoxicating liquors, are in substance the same, except that the New York statute contains no express provision for exemplary damages. Code of Iowa, 1873, Sec. 1557; N.Y. Statute at Large, Vol. 4, page 54, Sec. 28; Rev. Stat. Ill., 1874, page 439, Sec. 9; Rev. Stat. Maine, 1871, page 304, Sec. 32; Rev. Stat. Ohio (S. & C.), page 1432, Sec. 7. The courts of last resort in these States have given these statutes a very practical and liberal construction.

In New York it was held in a peculiar case "that it was not necessary for plaintiff to show that the injury was the natural, reasonable or probable consequence of his intoxication, and that it was sufficient if it appeared that the act was done while the person was intoxicated." There is no comparison between this case and the case at bar. It is only cited to show how

jurists of other States construe a statute similar to our own, and the reasons given for so construing the same. See *Neu v. McKechnie*, 95 N. Y. 632.

It is not the intention of the statute that the intoxication alone, exclusive of any other agency, shall do the whole injury for which a civil remedy is given. The statute was designated for a practical end and to give a substantial remedy, and should not be so construed as to defeat the purpose designated. *Schroder v. Crawford*, 94 Ill. 357.

For a full discussion of the right to maintain the action, the damages that may be recovered, etc., see *Hacket v. Smelsley*, 77 Ill. 109; *Horn v. Smith*, 77 Ill. 381.

A saloon keeper is liable where a man becomes intoxicated from liquors sold by the saloon keeper, and while so intoxicated falls or jumps from a street car and gets his leg crushed, and several days thereafter dies from the effect of such injury. *McMahon v. Sankey*, 133 Ill. 636.

Where the evidence shows a wilful or wanton violation of the law, or reckless or illegal acts and conduct in utter disregard of the rights of others, exemplary damages may be assessed in addition to the actual damages. *Kennedy Bros. v. Sullivan*, 136 Ill. 94; *Field on Damages*, 2d Ed. 471-2; *Salsbury v. Herschinroder*, 106 Mass. 458.

Appellee had a perfect right to remit a part of the damages in this case to avoid a new trial. *Union Rolling Mill Co. v. Gillen*, 100 Ill. 52.

A bill of exception is a pleading of the party tendering it. *Rogers v. Hall*, 3 Scam. 5.

To make case for recovery under statute for injury by death of husband, plaintiff must show: 1. That defendant gave or sold intoxicating liquor to husband. 2. That such liquor caused his intoxication, in whole or in part. 3. That such intoxication caused his death. 4. That by reason of such death, plaintiff was injured in her means of support. If the first three steps are established, the fourth may be inferred. *Flynn v. Fogarty*, 106 Ill. 263.

This court will not reverse, unless it is apparent that injustice has been done. *Grier v. Puterbaugh*, 108 Ill. 602.

SAMPLE, J. This suit is brought under the Dram Shop Act, to recover damages for the alleged loss of the means of support occasioned, as claimed, by the death of appellee's husband, caused by the sale of intoxicating liquors to him by the appellant. It is clearly proven that appellant sold to appellee's husband, on the day of his death, intoxicating liquor; that such liquor caused him to become quite intoxicated; that by reason of the husband's death the appellee was injured in her means of support. These three necessary elements are so fully proven, that they are not seriously controverted. It is earnestly contended, however, that the fourth essential element, in order to make a case, is not proven, viz.: That such intoxication caused the husband's death, or if it did, that the intoxication was so remote as a cause, that there can be no recovery. It appears from the evidence that the deceased, F. Butterbrodt, on Sunday, June 29, 1890, was at the appellant's saloon nearly all day prior to his death, and during that time obtained from appellant and drank such an amount of intoxicating liquor that he became quite noticeably under its influence. About four or five o'clock of the afternoon of the day of his death, he, with some other parties, went down to the Kaskaskia river to go swimming. He was not invited to go by any of the other parties, but being an expert swimmer, and knowing from their conversation that they were going down to the river for that purpose, went along of his own accord. It seems that the authorities of the village of Evansville, where the deceased resided, had forbidden swimming within the corporate limits. The parties therefore went down the river farther than usual. When they reached a gully the deceased insisted on going into the river there, while the other parties insisted that they should go still farther down. The deceased persisted and went into the river at that point. Soon after the deceased had gone into the river, the town constable came along and requested him to come out, as he was violating the ordinances of the village; but the deceased persisted in swimming out into the river, and, after reaching a distance of sixty or seventy yards from the bank, or, as some of the witnesses testify, one hundred yards, he suddenly sank out of sight, and before he could be rescued,

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was drowned. That he was not in a fit condition to go into the river seems to be established by the fact that those at the saloon tried to keep him from going down to the river, while others at the bank tried to keep him from going in after he got there, although it was well known that he was an expert swimmer.

A Mr. Heck swore that he was standing about twenty yards from where the deceased went into the river, and was looking at him when he drowned; that he swam out into the river by jerks; kept coughing; his head went under the water twice, and then he sank out of sight. Several other witnesses testify to substantially the same state of facts; among others the constable who had ordered the deceased to come out of the river, as the ordinance of the village forbade bathing in the river within the corporate limits.

He testified that the deceased swam out a distance, part of the time on his back, then turned over, made some kind of a motion and went under. He did not notice, however, that his head went under the water before sinking. We hold that under the evidence the jury were authorized to find that the deceased was drowned by reason of his intoxicated condition. It is urged by appellant, however, that the death by drowning was a *fatuitous* event not *naturally* resulting from the intoxication, and instances in illustration the case of a man being drunk, lying down under a tree, and during a storm it falls upon and kills him. He also cites the cases of Shugart v. Egan, 83 Ill. 58, and Schmidt v. Mitchell, 84 Ill. 197, in support of his contention. In the former case the drunken man was stabbed by another in a quarrel which he had provoked. In the latter case the drunken man was shot while attempting to enter the barn of another about midnight. It is not considered that the instances cited are like the case in hand. In the first case there was the intervening cause of the storm that caused the tree to fall. In the other cases cited from the Illinois reports there was the intervention of the independent act of a third person, directly producing the injury, between the wrong complained of and the damages sustained. It was upon this principle that both of these cases were decided. A *new* force had intervened, of itself sufficient to

stand as the cause of the injury, hence, it was held that the original cause, the intoxication, was too remote. The terms, *new force*, and *independent act*, it will be observed, *ex vi termini*, import that the original cause did not result in putting the person physically injured in the way of their operation. If the cause did so operate as to put the person in the way of the new force, or independent act, then, although such force or act directly produced the injury, yet in such case the latter would be the secondary, and the former the proximate cause. It is upon this principle that it has been held in this State (*Schrader v. Crawford*, 94 Ill. 357; *Emory v. Addis*, 71 Ill. 273), that a widow could recover damages from one causing the intoxication of her husband, who, while in that condition, was run over and killed by a railroad train. In both these cases there was a new force or independent act directly causing the deaths, yet for the reason that the intoxication put those persons killed in the way of the operation of such force or act, the intoxication was held to be the proximate cause. It has been held, for example, that case will lie against a defendant for not repairing his fences through which the plaintiff's horses escaped into the defendant's close and were there killed by the falling of a hay stack. Broom's Legal Maxims, 7th Ed., 207, referring in note 3 to leading cases upon this subject. And even in trespass, a person who sets in motion a dangerous thing which occasions mischief, will be liable, if the circumstances show such mischief to have resulted from a continuation of the original force applied to the moving body by the defendant, or if he can be considered in legal language as the *causa causans*. *Ibid.* In this case it was not unnatural that the deceased should go into the river, and the appellant might well have foreseen that for a drunken man to do so was dangerous. The fact that he may have disported himself with some skill for a time does not relieve the act of going into the water in his condition of its peril. There was no error in giving or refusing the instructions complained of in the argument of appellant. What we have already said disposes of the points made against them. The judgment will be affirmed.

Judgment affirmed.

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THEODORE KNEEDLER AND JAMES MATTHEWS

V.

JOHN P. ANDERSON.

Real Property—Contract for Conveyance of—Alteration—Statute of Frauds.

1. Changes may be made in sealed instruments after their execution by consent of the parties thereto, though made after delivery, and such consent may be proved by parol.

2. The doctrine that a contract under seal can not be changed by a parol agreement, does not apply to an actual change in the instrument itself by the direction or consent of the parties thereto. In such case there is no parol agreement existing independent of the contract.

3. This doctrine applies where the parol agreement exists independent of the contract under seal and where such contract is left intact in form.

4. A scrivener employed to put in writing a contract for the sale of land, may make changes therein at the instance of the parties thereto; authorization in writing is not necessary.

5. A contract for the sale of land does not have to be under seal, neither does the agent's authority to make such contract, but to be valid, it must be in writing.

[Opinion filed June 27, 1892.]

APPEAL from the Circuit Court of Madison County; the Hon. ALONZO S. WILDERMAN, Judge, presiding.

Messrs. DALE, BRADSHAW & TERRY, for appellants.

Messrs. W. F. L. HADLEY and W. H. KROME, for appellee.

SAMPLE, J. The appellants brought this suit to recover damages from the appellee for his failure to comply with his written contract, of date September 2, 1890, to convey a certain tract of land to them. The contract price of the land was \$5,000, to be paid by the plaintiffs on or before the 2d day of September, 1894. The contract was signed by the defendant under his private seal. The uncontradicted evi-

dence is that the scrivener, Squire Nelson, who drew up the contract at the house of the defendant, made a mistake, by which the contract price was made to appear \$6,000, instead of \$5,000, as had been agreed. This mistake was discovered by the defendant at the time the contract was written, but not by the plaintiffs until the next day, when one of them informed the defendant of the fact, when he replied: "I noticed the mistake at my house, but if you were willing to have it that way, I was." Whereupon said plaintiff and defendant got into the latter's buggy, drove to Squire Nelson's office and called him out, when the defendant informed the squire of the mistake, that the consideration expressed in the contract should have been \$5,000, instead of \$6,000, and directed him to correct the contract to make it conform to the agreement in that regard. The contract was corrected by Nelson as directed, by erasing \$6,000, and inserting \$5,000 as the consideration. Thereafter and before this suit was brought, the plaintiff tendered to the defendant the sum of \$5,000 in payment of the land, as provided in the contract, which the defendant refused to receive, claiming that he had sold and deeded it to another party, whereupon this suit was brought. The purchase price per acre under the contract was \$62.50, while the proof showed that it was worth from \$80 to \$100 per acre, the land lying within one-half mile of the corporate limits of the city of Collinsville. The court sustained an objection to the introduction of the contract, on the ground of the change that had been made, heretofore mentioned, and instructed the jury to find for the defendant. For this alleged error this case is sought to be reversed. The contention of the appellee is that the contract was under seal, and could not be changed by subsequent parol agreement; and second, that the contract related to the conveyance of land, and therefore the agent could not make the change without written authority from appellee. The appellants contend that the change was made as directed, by the parties to the contract, and therefore the contract as changed is valid and binding upon the defendant. It is clear, as contended by appellee, that a contract under seal can not be changed by a parol

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agreement. This doctrine, however, applies where the parol agreement exists independent of the contract under seal, and where such contract is left intact in its form. It does not relate to an actual change in the instrument itself, by the direction or consent of the parties thereto. In such case there is no parol agreement existing independent of the contract. The parol agreement is merged in the sealed instrument, just as much as the parol agreement that existed before the original instrument was written. That changes can be legally made in sealed instruments after their execution, by consent of the parties, is uniformly held in modern cases (*Collins v. Collins*, 51 Miss. 371; *Wooley v. Trustees*, 4 John. 54), although made after delivery, and the fact of such consent may be proven by parol evidence. *Steak v. W. S.*, 9 Cranch, 28. In this respect, as to an actual change in the written instrument itself, sealed contracts are placed upon the same basis as those not under seal.

The question as to either kind of contract is, was there consent? If so, the contract as changed is valid; if not, and the change was material, it is invalid, and no recovery can be had upon it. The remaining question is, was there consent of the parties to the change made in this contract? The statement of fact would appear to answer the query. Appellee's counsel, however, makes the point that, as the contract was for the conveyance of lands, under the statute of frauds, Nelson, the scrivener, could not make the change, even by the direction of the parties, unless he was authorized so to do in writing, and hence there was no lawful consent. It will be observed that this proposition can have no relation to the fact that the contract in this case was under seal, for a contract for the sale of land does not have to be under seal; neither does the agent's authority to make such contract; but to be valid, it must be in writing; that is all the statute of frauds requires. The fundamental error of appellee's position is in assuming that Nelson was the appellee's agent to make the sale of his land. Nelson was not his agent for any such purpose, and therefore the statute of frauds can have no application. He was merely the agent of the parties to put the parol agree-

ment of sale, made by appellee himself, in suitable written form. When the change was made by direction of appellee, and by consent of all parties, he was merely their agent for that purpose, and as such, merely the hand of the parties themselves. The direction of another hand to do that which they could lawfully do by their own, and the doing of it by such hand, was merely the execution of their own purpose by their own act. After such change, no part of the contract rested in parol or was not under seal. It remained the contract entire of the appellee as effectually as if he had made the change by his own hand. The court erred in excluding from the jury the contract for the sale of the land, and for this error the judgment is reversed and the cause remanded.

Reversed and remanded.

J. D. BLACKWOOD AND AUSTIN BLACKWOOD

V.

EMERETTA BOWEN.

Negotiable Instruments—Usury—Sec. 8, Chap. 74, R. S.

1. A note given as collateral security for a pre-existing debt is founded upon a valid consideration.

2. In an action brought to recover upon a note given as collateral to a note for a like sum, secured by a trust deed upon real estate, an extension of the loan represented thereby having been arranged, a foreclosure subsequently taking place, and a deficiency judgment against the makers of said collateral note entered, this court holds that the latter note was based on a sufficient consideration, that the usury law of the State of New York in view of Sec. 8, Chap. 74, Ill. Stats., did not apply thereto, and declines to interfere with the judgment for the plaintiff.

3. This court holds as proper, in the case presented, the refusal to strike the declaration from the files and dismiss the suit on account of an alleged variance between the writ and declaration, and for an alleged misjoinder of counts in debt and assumpsit in said declaration, on the ground that there is no variance, and that there is no count of debt in the declaration.

[Opinion filed June 21, 1892.]

Blackwood v. Bowen.

APPEAL from the Circuit Court of Jackson County; the Hon. W. W. BARR, Judge, presiding.

Mr. JOHN H. BAIN, for appellants.

Messrs. SMITH, McELVAIN & HERBERT, for appellee.

SAMPLE, J. The appellee brought suit against appellants upon the following instrument:

“MURPHYSBORO, ILL., October 1, 1886.

For value received we promise to pay, five years after date, to the order of Emeretta Bowen, at the First National Bank of Batavia, New York, the sum of \$1,000, with interest thereon at the rate of eight per cent per annum from and after the first day of July, A. D. 1886, until paid. Interest payable on the first days of January and July of each and every year; this note being given as collateral to a note made by James M. Blackwood (our father, now deceased,) for a like sum, dated June 1, A. D. 1872, and payable June 1, A. D. 1877, to the order of said Emeretta Bowen, with ten per cent interest, which note was secured by deed of trust on the N. W. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$, and the S. E. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ of Sec. 20, in T. 9. S., R. 2, W. of the 3d P. M., in Jackson Co., Ill., * * * the time of payment of which note was extended until July 1, 1886, and interest rate reduced to eight per cent. The lien of said trust deed on said land is to continue until said \$1,000, with the interest thereon, is paid according to this note.

J. D. BLACKWOOD,
AUSTIN BLACKWOOD.”

The declaration contained a special count on the foregoing note, certain common counts, and a count on an account stated. Appellants moved to strike the declaration from the files and dismiss the suit on account of a variance between the writ and declaration, and for a misjoinder of counts in debt and assumpsit in the same declaration, which was overruled, and that action of the court is the first error assigned. We hold on this point that there was no variance between the writ and declaration, and that there is no count of debt in the declara-

tion. The writ is in assumpsit as well as the first special count declaring upon the note, both in substance and form. The plaintiff complains of the defendants "on a plea of trespass on the case on promises." Its conclusion is in assumpsit in form, except as to the words, "and by force of the statute in such case made and provided," which are merely surplusage. The motion was properly overruled. The appellants then pleaded *nil debit*—which should have been stricken out as not a proper plea—usury under the law of New York, want of consideration, and the statute of limitations, on which issues were joined, and on trial before the court, judgment was rendered in favor of the plaintiff for the sum of \$269.

The recitals of the note contain a substantial history of the facts that led to its execution. It appears further from the evidence that the wife of James M. Blackwood also signed the trust deed securing the note signed by him; that the only heirs left surviving, were the widow and the signers of the note in suit; that the eighty acres covered by the trust deed was the homestead and the only land or property that was left by the deceased which was not worth to exceed \$1,000; that the appellants, after the death of their father, obtained an extension of the time for the payment of the note signed by their father, in consideration of which they signed the note in suit; that they failed to pay the interest as agreed, whereupon the trust deed was foreclosed, the widow and appellants being made parties, and the land was sold for an amount which left the deficiency with the interest that accumulated, for which judgment was rendered in this case.

The points of defense presented on the merits are, first, that there was a want of consideration for the execution of the note in suit; second, that the usury laws of the State of New York applied to the note, by which all notes that drew more than six per cent interest were void.

There was not a want of consideration for the execution of the note in suit. The makers became the owners of the land on which the trust deed was a lien, on the death of their father, subject to the homestead and dower rights of their mother. In addition to this, they were interested, not only

morally but legally, in providing for her a home and support. They induced the appellee to extend the time of payment on the note given by their father which was due at the time of his death. By this act they deprived the appellee of the substantial right of a speedy foreclosure of the trust deed and collection of her debt, and she might also have been injured by a depreciation of the value of the property, and thus further hazarded the collection of the debt. They were not strangers to the property involved; on the contrary, they had a direct interest in it. By getting the time extended they would be benefited, in the way of providing for its ultimate redemption, thus securing a home and support for their mother while she lived, and the property for themselves thereafter. It is no answer to say that the property was not worth more than the indebtedness. That was a matter for earlier consideration before the giving of the note in the suit. They evidently thought some advantage would accrue to them by securing an extension of time within which to meet the debt. They can not now be heard to say that they were mistaken. A note given as collateral security for a pre-existing debt is founded upon a valid consideration. See *Hancock v. Hodgson*, 3 Scam. 329, a case in its facts and in principle much like the one under consideration.

The note was not usurious. It was lawful for the parties under the laws of Illinois at the time, to contract for the payment of eight per cent interest. This rate was expressly contracted for, as shown by the correspondence between the agents of the respective parties, before the note in suit was executed. Sec. 8, Chap. 74, R. S., provides that "When any written contract, wherever payable, shall be made between a citizen of this State and a citizen of any other State, or shall be secured by trust deed on lands in this State, such contract may bear any rate of interest allowed by law, to be taken or contracted for by persons in this State, or may be allowed by law on any contract for money due or owing in this State." See *Fowler v. Equitable Trust Co.*, Chicago Legal News of November 14, 1891, Supreme Court decision.

The judgment below was right and is affirmed.

Judgment affirmed.

OHIO & MISSISSIPPI RAILWAY COMPANY

V.

RICHARD WANGELIN, ADMINISTRATOR.

Master and Servant—Negligence of Master—Railroad Company—Personal Injuries—Defective Draw-bar—Cars with Platforms of Unequal Height—Fellow-servants.

1. It is proper to refuse an instruction, the substance of which is embodied in one given for the same party.

2. Likewise one invading the province of the jury, by instructing them in a given case that there was no evidence to prove a material fact.

3. It is not necessary in an action brought to recover for the death of a servant through the alleged negligence of his employer, in order to recover substantial damages, that proof be introduced as to the amount contributed by deceased in his lifetime toward the support of the next of kin, in view of the uncontradicted facts that he actually did contribute to the relative's support, and that such person actually was in need of help.

4. How such pecuniary damage is to be measured, must be largely left to the discretion of the jury in a given case. This court holds the sum of \$2,000 to be reasonable in the case presented.

5. A master must use reasonable diligence to provide his servant with reasonably safe machinery and apparatus, which such servant is employed to operate. This law is not only applicable to the machinery owned by the master, but to other machinery and apparatus owned by another person than the master, which the servant is required in the line of his duty to use, and the rule applies to cars of other roads.

6. No defect is latent that an inspection will disclose.

7. A master is not entitled to notice of defects in appliances which he is bound to furnish in proper shape for the work they are called upon to perform.

8. In the case presented, this court holds that defendant was guilty of negligence in furnishing a certain car belonging to another road for the use of its employe, who was killed through such use, without giving him notice of its condition.

[Opinion filed June 21, 1892.]

APPEAL from the Circuit Court of St. Clair County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding.

Messrs. POLLARD & WERNER, for appellant.

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MESSRS. TURNER & HOLDER, for appellee.

SAMPLE, J. This suit was brought by the administrator of Frank O. Wangelin, deceased, to recover damages for the death of his intestate, occasioned, as alleged, by the negligence of appellant. The declaration in two counts charges, first, that the deceased was crushed between two cars while attempting, as a brakeman, to make a coupling, owing to a defective draw-bar, of which appellant had notice, which broke, and thus permitted the cars to come together, at which time the deceased was in the exercise of due care; second, that in addition to the above, the draw-bar of one car was so much higher than the other that when the cars came together, one draw-head passed under the other, and thus the bodies of the cars came together, crushing the deceased. The evidence discloses substantially the following facts: that deceased was in the employ of appellant as rear brakeman on the second day of April, 1890, the day of the accident; that when his train reached Odin, where appellant's line of road intersects that of the Illinois Central, it pulled up to the platform of the station and was then cut in two; a part of the train ran to a switch north of the main line and near to the depot for the purpose of taking on a car from the Illinois Central line; that deceased cut the switch to get to that line and also shut it, as the train came back on the main line with the extra car, went ahead of the moving portion of the train, picked up a pin and link that he had placed on the platform, adjusted them in the end of the draw-head of the Illinois Central car, stepped onto the platform of the station, moved along with the train a short distance as it was backing to be connected with the rear portion of the train, and just before the cars came together, caught hold of the iron step at end of the Illinois Central car, then stepped in to make the coupling, when the ends of the bodies of the cars came together and crushed him to death instantly, the draw-bar of the Illinois Central car passing under that of the Ohio & Mississippi car, and breaking off a portion of the latter, which fell on the track; that as the draw-bar of the Illinois Central car passed under that of the Ohio & Missis-

Mississippi car, the wheels of the latter were raised from the track and the force of the concussion drove back the cut off portion of the train about thirty feet; that the train was backing pretty rapidly, and no signal was given by the deceased to the engineer as to the speed of the moving portion of the train; that the accident happened in the daytime, and was described by three eye witnesses to the same, who were at the time standing on the station platform. The evidence further shows that there was no defect in the material of the draw-bar of the Ohio & Mississippi car; one witness testified that the draw-head had a crack on one edge of it, but does not say whether it was made by the concussion or not; while another witness for appellee says the crack or break was fresh and bright. It further appears from the evidence of the appellant's only witness, the front brakeman, that it is the duty of a brakeman to be cautious not to couple cars when the train is moving too rapidly, and to see that the coupling is in proper condition before he attempts to make it, and to see that the draw-bars are of the same height; also that by the rules of appellant the brakeman doing the coupling has control of the speed of the train. It further appears from the evidence that the deceased left only one sister surviving him, his father and mother and other members of his family having died. The sister, Clara Wangelin, testified that this deceased brother was getting \$50 per month, and had contributed to her support; that her brother was twenty-two years of age at the time of his death, and that he had been earning regular wages since he was seventeen years of age, not all, but part of that time; that she was a teacher in a kindergarten school in St. Louis at a salary of \$25 for five weeks' teaching, which was not sufficient to support her, and that her brother had assisted in her support.

The case was tried before a jury, which returned a verdict in favor of appellee in the sum of \$2,000, which was sustained by the court. The appellant assigns for error that the court refused to give for it proper instructions; that the appellee's counsel in the trial below was guilty of misconduct prejudicial to the appellant; that the verdict is against the

evidence and the law; that it is excessive and that the motion for a new trial should have been granted.

The refusal to give two instructions is complained of in the argument of appellant, the first of which is to the effect that the mere fact that one of the draw-bars broke, was not sufficient, of itself, to establish negligence. This instruction was properly refused for the reason that the substance of it was embodied in the first instruction given for appellant. The second refused instruction was, "that no evidence having been introduced from which it can be ascertained with any reasonable degree of certainty, to what extent the decedent's sister has suffered pecuniary loss by reason of the killing of her brother, Frank Wangelin, your verdict, if for the plaintiff, can only be for nominal damages."

This instruction was properly refused as it invaded the province of the jury by instructing them that there was no evidence to prove a material fact. There was evidence to show that the brother had contributed to the sister's support, but none to show the amount he contributed. It was not necessary in order to recover substantial damages, that there should be such proof, in view of the uncontradicted facts that the deceased actually did contribute to the sister's support, and that she actually was in need of it. As was said in the case of *C. & A. R. R. Co. v. Shannon*, 43 Ill. 346: "If the next of kin have been dependent on the deceased for support, in whole or in part, it is immaterial how remote the relationship may be; there has been a pecuniary loss for which compensation under the statute must be given." As was in that case further said: "How this pecuniary damage is to be measured, must be largely left to the discretion of the jury; what the life of one person is worth to another in a pecuniary sense, is a question incapable, from its nature, of exact determination." The doctrine of that case has been followed and adhered to in this State whenever the question has arisen. *City of Chicago v. Hesing*, 83 Ill. 207; *City of Chicago v. Keefe*, 114 Ill. 230. In the latter case it is said: "The question from its nature is incapable of exact determination, and the jury should therefore calculate the damages in reference to a reasonable

expectation of benefit as of right or otherwise from the continuance of life. Parents and even brothers and sisters might reasonably expect in many ways to derive pecuniary benefit from the continued life of the intestate, as of grace and favor, if not of right, at any age of life, and our statute imposes the duty of support in the event of their becoming paupers, of the parents by the child, and of one brother or sister by another brother or sister." We recognize the distinction made between lineal and collateral kindred by the Supreme Court of this State as to implied pecuniary damages, but in this case there is proof of actual pecuniary damages sustained by the sister in the death of her brother; with that proof in the record, together with the proof of deceased's age, health, ability and inclination to work, his earnings and her state of dependence, we hold that without other proof as to the amount the brother actually contributed, it was proper for the jury to exercise their own judgment from the facts in proof, by connecting them with their own knowledge and experience which they are supposed to possess in common with the generality of mankind (*City of Chicago v. Major*, 18 Ill. 349), and that direct proof of any specific pecuniary loss is not indispensable to the recovery of substantial damages with such proof in the record. *Fisher v. Jansen*, 128 Ill. 549, 555. Suppose there had been proof that the deceased brother had actually contributed to the sister's support various amounts during different years, ranging from fifty to two hundred dollars respectively, which amount would have been the proper basis for an estimate as to future contributions? Evidently neither, necessarily, for the condition of the parties might in time, and probably would, have changed. For these and various other reasons that might be assigned, the measurement of damages in such cases can not be fixed by any exact legal rule other than that given in the statute itself, authorizing the action, viz., that "the jury may give such damages as they shall deem a fair and just compensation with reference to the pecuniary injuries resulting from such death to the * * * next of kin of such deceased person, not exceeding the sum of \$5,000." When there is a basis for

substantial damages, as is held to be the fact in this case, the limitation in the amount of a verdict is found not only in the common law authority of the revisory power of courts, but in the statute itself, by declaring that the pecuniary compensation for the loss must be fair and just.

In this connection we will consider the error assigned that the verdict is excessive. As we have no fixed rule other than that above suggested by which to measure the damages, it is somewhat difficult to determine the question. It can only be done by a consideration of the relation and situation of the parties as disclosed by the proof. The beneficiary in this case, it is fair to infer from the business in which she is engaged, is a woman of some refinement and education, and necessarily has to array herself in a manner that will comport with her calling in life. She is poor and only earns while teaching \$5 per week. Allowing ourself the liberty in reviewing this verdict which was given by the authority above cited to the jury that rendered it, and connecting the above facts with our own knowledge and experience, and we know that such a small salary would not go very far toward supporting this lady in a reasonably comfortable manner; we further know under the above facts, as a matter of law, that there was no living person that she could legally look to for support in case of the direst necessity other than her brother. Sec. 2, Chap. 107, Ill. Stats. Had he contributed \$20 per month to her support, this amount, together with what she earned during a portion of the year while the schools were open, would have required her, living in a city, paying board, arraying herself in a suitable manner, to practice great frugality. Whether he would have paid such an amount we do not know, but this we know, by reasoning along the line of motive that inspires human conduct, there was every incentive and natural prompting of the human heart to make the deceased liberal with his sister, without father or mother, brother or sister other than this beneficiary. Young and rugged in health, apparently industrious, she might reasonably expect, in the language of the Keefe case, *supra*, not only as a matter of right but of grace

and favor, to derive pecuniary benefit from the continued life of the intestate at any age of life. Wherefore, in view of all the facts surrounding this case, we can not say that the verdict is excessive if the appellee was entitled to recover anything, which question we will next consider.

As has heretofore been stated, there is no proof that the draw-bar on the Ohio & Mississippi car which broke was defective; or even if there was such proof there is none that the appellant had the slightest notice of it, and there is no complaint or proof of its improper construction. There is unquestioned proof, however, that the draw-bar of the Illinois Central car which was transferred to appellant's road was lower than the draw-bar of the Ohio & Mississippi car to which it was to be coupled, so much so that it was projected under the latter, whereby the bodies of the box cars were permitted to come together, which defect was the direct cause of the death of appellee's intestate. This defect in the Illinois Central car, if it may be so called, was with reference to its use on the Ohio & Mississippi road, one of construction and not of deterioration or latent imperfection; hence, under the rule of law as to construction, if improper as to its use on the Ohio & Mississippi road, it was not necessary to prove that appellant had notice of that fact, as is said in the case of *Alexander v. Town of Mt. Sterling*, 71 Ill. 366: "Why notice to a party of original defects in a work he is bound to make safe and reasonably free from defects? The town being in fault at the onset, no notice was necessary;" citing authority. It is elementary law that a master must use reasonable diligence to provide his servant with reasonably safe machinery and apparatus which such servant is employed to operate. This law is not only applicable to the machinery owned by the master, but other machinery and apparatus owned by another person than the master which the servant is required, in the line of his employment, to use, as held in the most recently published expression of the Supreme Court in the case of *Sack v. Dolese*, 27 N. E. Rep. 62. The doctrine of this case is supported by a number of decisions of other States; then logically it would appear that it must be considered from a legal standpoint that

the appellant furnished this Illinois Central car to the deceased, and the same elementary rule of duty was imposed upon it to see that the car was reasonably safe for its servant to operate, as that above stated. This it did not do. The draw-bar of the Illinois Central car was so much lower than that of the Ohio & Mississippi car, that it was not only not safe, but extremely dangerous, not only to limb but to life. The defect was not latent; no defect is latent that an inspection will disclose. Dolese case, *supra*. In such a case it is said as to the civil remedy, the question is to be considered as if the master was present, saw the improper construction or use, and with such knowledge permitted the servant to use such machinery. For this reason notice to the master is unnecessary in such cases. It is not contended by appellant's counsel that the draw-bar of the Illinois Central car was not lower than that of the Ohio & Mississippi car, but they say, "The absurdity of the position that such difference in height * * * in this case can furnish a ground for recovery, when the only source of notice to appellant of such difference was the intestate himself, is apparent on the face of it." If this is the correct view as to notice as to foreign cars, then the rule of law should be, "let the servant beware." This view, however, is in direct conflict with the doctrine of the Dolese case, *supra*, and which appellant invoked in its behalf, and wherein it is held, "The same rule of reasonable care with reference to *proper machinery* and *inspection* applies in the case of cars *belonging to other persons* which the servant is required to operate in the course of the master's business, as governs when the cars are owned and provided by the master himself." Merging the doctrine of this latter case into that of the doctrine of notice by the master in case of improper construction of cars "owned and provided by himself," and it would seem that the position of appellant's counsel is unsound.

It must be borne in mind in this connection, that as to the point now under consideration, we are determining the law under conceded or unquestioned facts as to whether they constituted negligence of the master and not as to the contributory negligence of the servant. The latter is relative and

need only be considered in case of proof of the former. The authorities cited by appellant on this question are not considered to be in point, some of them in view of the doctrine as laid down in the Dolese case, and others because of the facts upon which they were based. In Massachusetts the doctrine is that the making up of a train of cars with platforms of unequal heights was the *act of a fellow-servant* and therefore a brakeman can not maintain an action against the corporation (Hodgkins v. Eastern R. R. Co., 119 Mass. 419), and that the rule requiring a railroad company to use reasonable diligence in furnishing its employe with suitable cars does not apply to a car received from another corporation while in transit to its place of destination. That while it does owe the duty of providing competent inspectors for such cars, yet such inspectors and the brakemen using the same are fellow-servants. These cases do not state the law of this State. The case of Whitman v. The W. & M. R. R. Co., 58 Wis. 413, is based upon the same doctrine as the Hodgkins case, 119 Mass., *supra*. It is said the attaching, as well as the order detaching the engine from the car, were the acts of the servants of the defendant engaged in operating their railroad, and hence of the co-employe of the plaintiff, and therefore the defendant is not liable for the injury to the plaintiff resulting therefrom. The case of Brooks v. Northern Pacific R. R. Co., 4 Fed. Rep. 687, wherein a switchman was injured by too short a draw-bar on the engine, is based on the contributory negligence of the plaintiff, and the further fact that the rules of the company embodied in the contract of employment which he signed expressly provided that he should inspect and take notice of the style, construction and conditions of draw-heads, links and pins to be used in coupling engines and cars. To show that the doctrine claimed for the above case by appellant was not the rule of the Federal Court, we refer to the case of O'Neil v. St. L., T. M. & S. Ry. Co., 9 Fed. Rep. 337, wherein it is held that an employer who introduces without notice to the employe new and unusual machinery, whether belonging to himself or another, involving unexpected danger, by which the employe while using due care is injured, is liable in damages. See

copious notes to this case. The cases of St. L., T. M. & S. R. R. Co. v. Higgins, 44 Ark. 293; Hulett v. St. L., K. C. & A. Ry. Co., 67 Mo. 239; St. W., J. & S. R. R. Co. v. Gildersleive, 33 Mich. 134; Marsh v. The S. C. R. R. Co., 56 Ga. 274, were very largely based on the actual notice of the brakemen of the condition of the draw-bars and therefore on contributory negligence. The other class of cases cited when brakemen were injured in their hands or arms in the use of different kinds of couplings, wherein proof was made that such was common practice known to railroad men, are not considered in point. Injuries thus occasioned under such a state of facts are held to come within the hazards of the service. We hold under the law of this State, as applicable to the facts in this case, that the appellant was guilty of negligence in furnishing such a car for use by its injured employe without notice to him of its condition.

Was the deceased guilty of contributory negligence? The jury were instructed by the court on this point of law as asked by the appellant. They were instructed that there could be no recovery, if it appeared from the evidence that the deceased was guilty of a want of ordinary care which directly contributed to his death, and then whether or not the defendant may have been guilty of the negligence with which it is charged in the declaration. This instruction made the question of contributory negligence one of primary consideration for the jury. By their verdict it was determined in the negative. Is that finding sustained by the evidence?

The only fact that brings it in question is the speed of the train at the time the coupling was made, and whether or not the deceased should have seen, before the coupling was attempted to be made, the difference in the heights of the draw bars of the two cars that were to be coupled together. It is true that several witnesses who were not railroad men and had no experience in that line of work testified that the train was backed pretty rapidly, yet when the facts testified to by them are considered, the speed does not appear to have been dangerous. As heretofore stated, the evidence discloses that the deceased opened the switch for the detached portion

of the train to run thereon, and also shut it, after the train had come back on the track, and then on foot overtook it, picked up a pin and link on the platform, adjusted them in the draw-head of the Illinois Central car, by which time the two portions of the train were near together, momentarily stepped out on the platform, walked along it a short distance, when he stepped in between the cars just before they met, to make the coupling, and was instantly crushed by the bodies of the cars coming together. There is no evidence that the deceased was particularly rushed, or had to move with more than ordinary celerity to accomplish all this. In view of these facts, outside of the mere expression of opinion, it is quite evident that, so far as the speed of the train is concerned, any railroad brakeman would have done just as the deceased did, and would not have hesitated to go in and attempt to make the coupling. It is not to be presumed that the brakeman and engineer were both reckless and regardless of life. The accident occurred in the day time, when the engineer could see how near the cars were together, almost as well as the brakeman. The fact that the cut-off portion of the train that was left standing on the main track was jarred back thirty feet is not decisive evidence that the concussion was very great, as common experience will prove, especially in the absence of any proof as to the number of cars in that portion of the train and as to the brakes being set. The speed of the train may have been faster than it should have been, especially as it appeared to unprofessionals in that line, but what we hold is, that, in view of all the facts, the act of the deceased in attempting to make the coupling as, and at the time he did, was not an exhibition of recklessness or negligence for an ordinarily courageous brakeman, as regards the speed of the train.

Should he have observed that the draw-bars were of unequal heights? As heretofore suggested, under the law he had a right to presume that they were in reasonably safe condition. We do not mean by this, that the style of the couplings was the same, but that there was no such a difference in height of the draw-bars of the two cars that they

would pass each other, and thus permit the bodies of the cars to come together. With this presumption of law which he had a right to, and doubtless did, as a matter of fact, indulge, he would naturally be thrown off his guard, not as to the difference in the style of the couplers, for with them he had immediately to do, but as to such a difference in the heights of the couplers or draw-bars, with which he had nothing in particular to do. This much for the legal phase of the question. Now as to the facts, they show, as heretofore stated, that the deceased was very busily engaged in opening and shutting switches, gathering up link and pin for their coupling, adjusting them in their proper places, all in the line of his duty, which, as the evidence shows, occupied his undivided attention until the cars were nearly together, when naturally his attention would be necessarily attracted to the proper and safe performance of the most dangerous part of his work. To hold that, under these circumstances, he was negligent, because he did not measure up with his eye the difference in the height of the two draw-bars, would, in our judgment, be imposing a rule of caution and care far above the line of that required by law and denominated ordinary. In the case of *Goodrich v. N. Y. C. & H. R. R. Co.*, 116 N. Y. 398, where a brakeman was injured by a similar defect, and when he had been standing unengaged by the stationary car awaiting the backing of the train to make the coupling, the court, on page 404, say:

“It does not appear that he observed that the draw-bar would pass under the bumper of the stationary car. It was only at the moment that the cars were about to collide that he discovered his error.

“The court can not affirm that for such error of judgment, as it was to some extent by defendant's neglect, he should be held to have been careless under such circumstances. When the whole transaction is the occurrence of a moment, a man is not to be held responsible if he errs as to the estimate of the danger that confronts him. If he acts the part of a prudent man, willing and intending to perform his duty, he has done all the law demands of him, and whether he acted such part under all the circumstances was for the jury to determine.”

The remarks of appellee's counsel, that "Mr. Werner excused Mr. Joseph, one of the jurors, because he once employed Wangelin at a threshing machine and knew how well he was able to work," were improper, and the court had the right to orally instruct the jury to disregard such statement, and should have done so on request; yet the character of the statement when considered in connection with its withdrawal by the counsel making it, leads us to conclude that the jury were not prejudiced thereby, or the result of the suit affected in consequence thereof.

There being no material error in the record the judgment is affirmed.

Judgment affirmed.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

FIRST DISTRICT—OCTOBER TERM, 1891.

THE PEOPLE OF THE STATE OF ILLINOIS, FOR USE, ETC.,

V.

WILLIAM A. ZINGRAF ET AL.

*Principal and Surety—Constable's Bond—Action on—Exemptions—
Judgment in Trocer against Principal.*

1. When the condition of a bond is to abide the order or judgment of a court, the action of a given court binds the surety, though he had no opportunity to influence it; but if it be to perform an act *in pais*, then such a judgment against the principal is not evidence against the surety.

2. If, upon the schedule presented by a debtor, it was the duty of an officer to release property attached, as exempt, and he failed to do so, all the facts from which the duty arose should be stated in the declaration in an action upon the officer's bond.

3. Whenever facts alleged involve a question of law, they must be so stated that the court can see that the legal conclusion relied upon follows.

4. In an action on such bond the recovery must be against all the defendants, or none.

5. This court holds that the averment of the declaration in the case presented was insufficient, and declines to interfere with the judgment for the defendants.

[Opinion filed November 2, 1891.]

IN ERROR to the Circuit Court of Cook County; the Hon.
JULIUS S. GRINNELL, Judge, presiding.

Messrs. A. H. THOMPSON and LEVI SPRAGUE, for plaintiffs in error.

Mr. SYLVESTER G. ABBOTT, for defendants in error.

GARY, J. The parties here are in the same position as in the Circuit Court. The action is upon the bond of a constable, against him and his sureties, alleging as the breach of the condition to "faithfully discharge the duties of his office as constable," that Zingraf refused to surrender to Shambaugh property of hers which he had levied upon under an execution against her, upon her claim that it was exempt under the statute. The declaration shows that she had recovered a judgment in trover against him, for a conversion of the property, but without satisfaction.

The defendants pleaded to the declaration, and on demurrer to all their pleas, the declaration was adjudged insufficient, and final judgment entered for the defendants. To reverse that judgment this writ of error is prosecuted.

The briefs are mainly for or against the proposition, that the judgment in trover against the constable is a bar to any recovery upon his official bond. Whether the Circuit Court held that proposition to be law and decided the case upon it, we have no means to ascertain, nor is it of any consequence, if for any reason the judgment is right. *Potter v. Gronbeck*, 117 Ill. 404. But it would seem easier in the great conflict of authority to show that such a judgment fixed the liability of the defendants, than that it discharged them. See the cases collected in *Freeman on Judgments*, Sec. 180; *Black on Judgments*, Sec. 588-590; *Brooks v. People*, 15 Ill. App. 570; *McAllister v. Clark*, 86 Ill. 236.

The proper distinction between the cases in which a judgment against the principal is, or is not binding upon the sureties, is pointed out by Sanderson, C. J., in *Irwin v. Backus*, 25 Cal. 214, and quoted by Black in note to Sec. 589.

When the condition is to abide the order or judgment of a court, the action of the court binds the surety, though he had no opportunity to influence it; but if it be to perform an act

The People v. Zingraf.

in pais, then such a judgment against the principal is not evidence against the surety.

This case falls within the latter class. It is therefore necessary to look to the averments of the declaration to see whether, without reference to the judgment against the constable, official misconduct, constituting a breach of the condition of his bond, is shown; for though the judgment against him may estop him on that point, yet in this action on the bond, the recovery must be against all or none of the defendants. *Tolman v. Spaulding*, 3 Scam. 13, has been often followed. *Enterprise Distillery Co. v. Bradley*, 17 Ill. App. 509.

Now the averment of the declaration is that "within seven days of the time said execution was issued and levied upon said piano as aforesaid, (she) made and executed under oath her schedule for exemption, as by the statute in such case made and provided," etc., demanded the piano and was refused.

This is wholly insufficient. No facts are stated to show what the schedule was, or that she could claim the piano as exempt. It is not shown that the piano was worth no more than \$100, nor that she was the head of a family; and the piano not worth more than \$300. Had she other property, then it was her duty to schedule it and turn it out. Statute "Exemptions" as amended in 1887; *McMasters v. Alsop*, 85 Ill. 157. Whenever the facts involve a question of law, they must be so stated that the court can see that the legal conclusion relied upon does follow. *Corwin v. Shoup*, 76 Ill. 246; *Byrne v. McMurty*, 2 Gilm. 424.

If upon the schedule presented it was the duty of the constable to release the piano, all the facts from which the duty arose should be stated in the declaration. *Zjednoczenie v. Sadeki*, 41 Ill. App. 329.

The demurrer was rightly carried back to the declaration, and the judgment is affirmed.

Judgment affirmed.

43	340
141s	261
43	340
54	106

THE MUTUAL ACCIDENT ASSOCIATION OF THE NORTH- WEST

V.

B. F. JACOBS AND G. B. SHAW, ASSIGNEES.

Banks—Deposits, General and Special—Bailments.

1. A special deposit is a deposit to be returned in the identical thing; the very bills or coins are to be returned.

2. A general deposit is one which is to be returned in kind, not the same bills or coins, but the same amount of money.

3. Where money is received in a bank as a special deposit for safe keeping, with the understanding that it shall be cared for and the identical money returned, the bank has no right to use the money in its business, but where the money is deposited with the understanding that a like sum shall be repaid, the transaction is in the nature of a loan, the relation of debtor and creditor being created, and no trust can be predicated on such a deposit.

4. A deposit must be considered to be a general deposit where the money in question has been mixed with the funds of a bank by the acquiescence, or with the consent of, the depositor.

5. In the case presented, this court holds, in view of the evidence, that the deposit in question was general, not special.

[Opinion filed December 7, 1891.]

APPEAL from the County Court of Cook County; the Hon. FRANK SCALES, Judge, presiding.

Messrs. ALBERT H. VEEDER and MASON B. LOOMIS, for appellant.

That this deposit was not made in the ordinary course of banking business is apparent. At the time appellant had a regular deposit account at Kean's branch bank, subject to check.

If this had been an ordinary deposit it would undoubtedly have gone into this account. But it is conclusively established by the special certificate of deposit given to appellant at the time—by all the testimony, and by the admission, under

oath, of appellees, in their original answer herein, that this money was placed in Kean's hands as collateral security, both to himself and to Cummings, as sureties on the appeal bond, and Kean thereby became a bailee, or trustee of the fund, and had no right or authority to use it for his individual purposes, or to pay it out or intermingle it with the general funds of his bank.

Kean assumed the obligations of a bailee, by receiving this money on special deposit, as collateral security. *First Nat. Bank v. Graham*, 100 U. S. 699; *Foster v. Essex Bank*, 17 Mass. 479.

The execution of the receipt, or certificate, by Knox as the agent or manager of Kean for a special deposit of the money, and its delivery to appellant, created the relation of bailor and bailee between Kean and appellant. *Manhattan Bank v. Walker*, 130 U. S. 267; *Honig v. Pac. Bank*, 73 Cal. 464; *James v. Greenwood*, 20 La. Ann. 297; *Stewart v. Frazier*, 5 Ala. 114; *Colyar v. Taylor*, 1 Coldw. 372; *Story on Bailments*, Secs. 106-414.

If it be said that this was only a pledge, the answer is that a pledge is a bailment, and therefore governed by the same rules of law. 2 Kent's Com. 577; *Story on Bailments*, Sec. 286.

And the obligation of the pledgee to preserve the property is equal to that of a person who has it in his custody on a bailment for hire. *Jones on Bailments*, Sec. 120.

Money may be delivered in pledge. *Story on Bailments*, Sec. 290.

In the case of *The Union Trust Co. v. Rigdon*, 93 Ill., the court say: "The law is well settled where there is no agreement otherwise, the pledgee in possession takes only a lien on the property as a security, and is bound to keep the pledge and not use it to its detriment, and to redeliver it on payment of the debt. His character is that of a trustee for the pledgor to return the property, if redeemed, and if not redeemed, then first to pay the debt, and second to pay over the surplus, and he can not so deal with the trust property as to destroy or even impair its value. See also *Joliet Iron Co. v. Sciota F. B. Co.*, 82 Ill. 548.

Messrs. JESSE A. BALDWIN, and KRAUS, MAYER & STEIN, for appellees.

The evidence already quoted, which we need not repeat here, demonstrates that the deposit in question was not a special deposit, and therefore appellant is in error when it says that, "Kean assumed the obligations of a bailee by receiving the money on special deposit as collateral security. *First National Bank v. Graham*, 100 U. S. 699; *Foster v. Essex*, 17 Mass. 479." In those two cases there existed a state of facts fundamentally different from those here. In *First National Bank v. Graham*, there was a special deposit of bonds for safe keeping. The bonds were stolen and defendant was held as bailee. In *Foster v. Essex Bank*, bags of gold were deposited, the receipt stating "for safe keeping," and the entry of the deposit was made in a book called "special deposits." In neither case was the deposit made as security, nor of funds of which the bank had a right "to change the form of," or use in its own business, as in the case at bar. In order to recover in this case appellant must prove certain elements, the primary one of which is that the deposit in question was a special deposit.

A special deposit, according to *Anderson's Law Dictionary*, page 344, is: "A deposit to be returned in the identical thing," while a general deposit is, "A deposit which is to be returned in kind." So, also, *Morse on Banking*, 3d Ed., Vol. 1, Sec. 190, says that a special deposit "is the placing of something in the charge or custody of the bank of which specific thing restitution must be made." To the same effect see 2 *Am. & Eng. Ency. of Law*, 93; *Story on Bailments*, Sec. 88.

Neither can it be successfully contended that the deposit in question was a bailment. A bailment is "A delivery of some chattel by one party to another, to be held according to the special purpose of the delivery and to be returned or delivered over when that special purpose has been accomplished." (*Schouler on Bailments*, p. 1.) "When the identical thing delivered, though in an altered form, is to be restored, the contract is a bailment, and the title to the property is not

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changed; but when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, the contract is not that of bailment." *Mallory v. Willis*, 4 N. Y. 85. And so it has been held in *Shoemaker v. Heinz*, '53 Wis. 116, that "where money of A is left by him for safe keeping with B, with the understanding, not that the identical money shall be cared for and returned to him, but only that a like sum shall be repaid him by B, this is not a bailment or special deposit, but a general deposit in the nature of a loan;" and in a case where gold coin was originally bailed as a special deposit and subsequently the parties agreed that the bailee should pay interest, the special deposit was considered as a loan. *Howard v. Rouben*, 33 Cal. 399.

A bailee has no right to use in his own business the bailment, as the evidence shows that Kean did in this case with the acquiescence and consent of appellant. *Story on Bailments*, Sec. 90.

The cases uniformly hold that where money is deposited in a bank and the bank is given the right to use it in its business, the relation of debtor and creditor is created and not that of bailor and bailee. *Otis v. Gross*, 96 Ill. 612.

MORAN, J. Appellant filed its petition in the County Court, representing that it had deposited in October, 1890, with S. A. Kean, the sum of \$6,000 as a special deposit to be held by the said Kean to indemnify himself and one Cummings from any loss or liability that might be incurred by them or either of them by reason of their having signed an appeal bond (as sureties) in a case wherein one Emma A. Tuggle had recovered a judgment against petitioner, in the Circuit Court of McDonough County, and from which said judgment an appeal had been perfected to the Appellate Court; that at the time the said \$6,000 was left with the said Samuel A. Kean, he was engaged in the banking business at the city of Chicago under the name and style of S. A. Kean & Co., having a banking office at No. 100 Washington street, and also a branch office at 143-145 Adams street in said city, which latter was

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operated under the care and management of one Wesley L. Knox, an agent for the said Kean; that the money was deposited with said Kean at said branch banking office, and a special certificate of deposit therefor was issued, as follows:

"Chicago, October 4, 1890. This is to certify that the Mutual Accident Association of the Northwest has deposited with Samuel A. Kean, of the County of Cook and State of Illinois, the sum of \$6,000, to be held by the said Kean upon the following conditions: Whereas, one Emma A. Tuggle of the County of McDonough, recovered a judgment against the said accident company, for the sum of \$5,000 and costs, from which the said accident company has taken an appeal to the Appellate Court, and whereas the said Samuel A. Kean and Jesse H. Cummings have signed the appeal bond in the said case, now, therefore, this \$6,000 deposited with Samuel A. Kean is to be held by the said Kean to indemnify himself and the said Jesse H. Cummings from any loss or liability incurred by them or either of them, by reason of having signed said appeal bond. And after the said Jesse H. Cummings and Samuel A. Kean are fully discharged from all liability under said bond, then the said \$6,000 is to be returned to the said Mutual Accident Association, but not otherwise. (Signed) S. A. Kean & Co., Branch; Wesley L. Knox, Manager."

The petition proceeds to allege that the \$6,000 so deposited was and is no part of the assets belonging to him, the said S. A. Kean, or to his estate, but that the same was, and always has been, and still is, the property of the petitioner and placed in the hands of Kean as a special deposit in trust, with the distinct and positive understanding between petitioner and Kean, that said \$6,000 was to be returned to petitioner by Kean as soon as said Kean and said Cummings should be discharged from all liability under said bond, as appears from the terms of said certificate. Petitioner prays that the said sum of \$6,000 may be declared to be the property of petitioner and a trust fund in the hands of said Benjamin F. Jacobs, assignee of said Kean, and that an order may be entered by the court directing him, the said assignee, to pay, deliver and return the same

to your petitioner, as soon as the said Samuel A. Kean and Jesse H. Cummings are fully discharged from all liability under the aforesaid appeal bond.

The record shows an answer to said petition in which it is denied that said \$6,000 ever became the property of said Samuel A. Kean, and avers the truth to be that said deposit became at once, upon its receipt by him, the property of said S. A. Kean; further denies that said \$6,000 or any part thereof, was in the possession of the assignee, and states that immediately upon its deposit by the petitioner, the said sum of \$6,000 became the property of the said Kean, and was by him commingled with other moneys and property of the said Kean in said banking business, and used and paid out by the said Kean in the regular course of business.

A careful consideration of the evidence as contained in the record, satisfies us that the statements of the answer are true. It was, we are persuaded, the meaning and the understanding of the parties to the transaction when the \$6,000 was deposited, that it should become the property of the said Samuel A. Kean, and should be used by him in his business, to be returned to the depositors when the liability upon the bond ceased under the terms of the memorandum between them. This is shown by the circumstances of the transaction. A check payable to the order of S. A. Kean & Co., for the said sum of \$6,000, was drawn upon the Union National Bank, and delivered to the said S. A. Kean & Co. by the officers of the appellant, the accident association. It appears from the evidence that it was intended that the money should be drawn on this check, and it is shown that it was promptly so drawn and used in the banking business of S. A. Kean & Co., and that the officers of the Mutual Accident Association knew that it was so drawn.

It further appears that in the negotiation between the parties, while it was not expressly agreed that there should be interest paid or allowed upon this \$6,000 by Kean, it was impliedly understood that some interest would be allowed upon it—*“that the right thing would be done”*—but whether interest was to be allowed or not, it was the manifest inten-

tion of the parties that the \$6,000 was not to be kept as a special deposit intrusted to Kean and to remain unused in the banking house of S. A. Kean & Co., but that it was to be, as we have before said, used in the regular banking business of the said S. A. Kean, and that he was in truth and in fact a debtor to the accident association for that sum, said debt to be paid to the accident association only upon the happening of a contingency on which the deposit was received. Under such circumstances it is impossible to construct a theory of trust with relation to said fund; that there was to be a special account of said money upon the books of the bank, is a very different thing from its being a special deposit. A special deposit is a deposit to be returned in the identical thing; that is, the very bills or coins are to be returned; while a general deposit is a deposit which is to be returned in kind, that is, not the same bills or coins, but the same amount of money, and "when the identical thing delivered, though in an altered form, is to be restored, the contract is a bailment, and the title to the property is not changed; but when there is no obligation to restore the specific article, and the receiver is at liberty to return another thing of equal value, the contract is not that of bailment." Schouler on Bailments, p. 1.

Where money is received in a bank as a special deposit, for safe keeping, with the understanding that it shall be cared for and the identical money returned, the bank has no right to use the money in its business; but where the money is deposited with the understanding that a like sum shall be repaid, it is not a special deposit, but is more in the nature of a loan, the relation of debtor and creditor being created by the transaction, and the rule is uniform that where such general deposit is made and the bank is permitted to use the money as its own in its general business, the relation established is not that of bailor and bailee, but is that of debtor and creditor, and no trust can be predicated on such a deposit. *Otis v. Gross*, 96 Ill. 612.

Whatever might be the rule if the deposit could be held to be a special deposit as contended by appellant, it also clearly appearing upon the testimony that it is impossible to follow

Chicago West Division Ry. Co. v. Conley.

the deposit as a distinct fund, the money composing it having been mixed with the general business of the bank, no uncertainty exists where, by the acquiescence, or with the consent of the alleged *cestui que trust*, there has been such mixture. Union National Bank of Chicago v. Goetz, 27 N. E. Rep. 907.

We are unable to agree with appellants in their contention, either as to facts or the law. The judgment of the County Court refusing the prayer of the petition was correct, and will therefore be affirmed.

Judgment affirmed.

CHICAGO WEST DIVISION RAILWAY COMPANY

v.

FRANCIS CONLEY, BY NEXT FRIEND, ETC.

Street Railroads—Injury to Third Persons—Assault by Conductor—Trespasser—Witnesses—Fees in Excess of Legal Rates.

1. The credibility of a witness should not be impeached for the reason that a litigant pays him a moderate sum in excess of his legal fees for attending a given trial.

2. In an action brought to recover from a street railway company for injury to a boy while "stealing a ride," the same being alleged to have occurred through being kicked off a moving car by the conductor thereof, this court holds, in view of the evidence, that the judgment for the plaintiff can not stand.

[Opinion filed December 7, 1891.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. W. B. KEEP and EDMUND FURTHMANN, for appellant.

Messrs. BRANDT & HOFFMAN, for appellee.

48	347
85	490
48	347
90	395

GARY, J. We have studied the evidence, as shown by the record in this case, carefully. The action is by the appellee, a boy of six years at the time of the accident, for the loss of his leg by the wheel of a car running over it. That he was standing or kneeling upon the steps of the front platform of a moving car, is certain. Whether he fell or jumped from that position, or was kicked from it by the conductor, is the question upon which the case turns. He asserts, and the conductor denies, that he was so kicked off. He is corroborated by a companion, then nine years old, who was running along the sidewalk, keeping up with the moving car. Both boys, on their way to a park, were "stealing rides" on the car.

The opportunity of that witness to see what happened at the car was by no means superior to that of several witnesses for the company. He had invited the appellee to go to the park, and by his example at least, had encouraged him to steal a ride. The impulse of human nature to throw the blame upon some one else (Gen. 3, 12,) should be remembered in considering the testimony of both these boys.

It appears that both boys had gone through several pantomimic, as well as spoken, rehearsals of their testimony in the office of the attorney (not on this appeal) of the appellee, who commenced the suit. The testimony of the only other corroborative witness is by deposition. That testimony has a very suspicious appearance: not only as to what it is, in itself, but as to the manner in which it became known to the appellee, and reasons why the witness testified by deposition, instead of appearing in court. And whether his testimony has reference to the appellee, or some other boy, might be questioned, as he did not know him, and only identified him as a boy he afterward saw with a Mr. Conley with whom he was unacquainted until they met in a saloon, some ten weeks before his deposition was taken, more than a year after the accident; and it does not appear that that boy has not still two legs. The denial of the conductor is corroborated in various ways by the testimony of nine other witnesses, several of whom are subject to no criticism on the score of their relations with the company.

The conductor was no longer employed by the company, but was in business in Canada. He was paid by the company \$10 per day and his expenses to attend the trial, and one mistrial before. Another witness, not employed by the company, a shoemaker in the city, was paid \$2.50 per day on the former trial, and expected the same again. Another, a steamfitter, was paid \$3 per day. Another, a retail grocer, \$5 per day. Another, employed by a railroad, not street railway, was paid in all \$10.30 for his attendance on the former trial. There is no hint that the sums paid were more than an adequate compensation to the several witnesses for their time spent.

Until quite recently the sums paid would have been allowed in England in the taxation of costs. 2 Taylor on Evidence, 1057. Whatever handle before a jury may be made of such payments, by an attorney gifted with extraordinary powers of invective, it ought not to impeach the credibility of witnesses that a party litigant does not insist, even as to resident witnesses, upon its legal right to compel them to attend in its behalf, at a loss to themselves.

To go into detail of the testimony of the witnesses for the defense, would take a great deal of space, and do no good; only serving to show that in fact we had studied it. We will only say, therefore, that it so strongly preponderates against the claim that the boy was kicked off, that in our opinion the case ought to be submitted to another jury. Without copying them, we may refer to the words of the Supreme Court at the bottom of page 411 in *C. B. & Q. v. Stumps*, 69 Ill. 409, and top of page 498 in *Reynolds v. Lambert*, 495 Ibid., as applicable here.

The appellants moved for a new trial, because the verdict was contrary to the evidence and assigns for error that it was not granted. That assignment is sustained, the judgment reversed and the cause remanded.

Reversed and remanded.

43	350
62	151
43	350
190	315

H. F. COOPER
v.
McNEIL & HIGGINS Co.

Actions—Judgments—Parties.

1. In actions *ex contractu* the judgment must be against all who are served or who appear.

2. Where a declaration charges two persons to be jointly liable under a contract, the trial demonstrating the contrary, it is error to render judgment against one of them.

[Opinion filed December 7, 1891.]

IN ERROR to the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

An action of assumpsit was begun in the Superior Court of Cook County against H. F. Cooper and W. D. Cooper as co-partners. A writ of attachment in aid being issued, summons was served on W. D. Cooper by the sheriff of Cook County.

Thereafter the sheriff of Kane County returned a summons directed to that county, duly served upon H. F. Cooper; he afterward returned upon a writ of attachment directed to Kane County, that he had received \$175.33 from H. F. Cooper to apply on said writ. Also that he had levied on some personal property of H. F. Cooper and returned with said writ a forthcoming bond signed by H. F. Cooper as principal and one P. H. Cooper as surety. W. D. Cooper, who was served in Cook County, filed a plea denying his joint liability. H. F. Cooper filed no plea whatever.

On the 7th of August, 1889, the default of H. F. Cooper was entered. On the 10th of March, 1891, the cause was heard upon the plea filed by W. D. Cooper, and the issue being found in his favor there was judgment upon such finding. Thereupon, for the purpose only of questioning the

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jurisdiction of the court over H. F. Cooper, E. A. Eldridge entered an appearance for him.

Thereupon upon the default of H. F. Cooper, theretofore entered, the court assessed the plaintiff's damages against him at \$200.62 and entered judgment therefor. From which judgment said H. F. Cooper has appealed.

Messrs. ALSCHULER & MURPHY, for plaintiff in error.

Mr. E. J. WILBER, for defendant in error.

WATERMAN, P. J. The rule that in actions *ex contractu* the judgment must be against all who are served or appear, or none, has always existed in this State. Kimmel v. Shultz, Beecher's Breese, 169; Russell v. Hogan, 1 Scam. 552; Hoxey v. Maconpin County, 2 Scam. 36; McConnell v. Swailes, 2 Scam. 571; Tolman v. Spaulding, 3 Scam. 13; Frink v. Jones, 4 Scam. 170; Wight v. Meredith, 4 Scam. 360; Dow v. Rattle, 12 Ill. 372; Fuller v. Robb, 26 Ill. 246; Gribbin v. Thompson, 28 Ill. 61; Briggs v. Adams, 31 Ill. 486; Faulk v. Kellums, 54 Ill. 188; Kimball & Ward v. Tanner, 63 Ill. 520; Byers v. First Nat. Bank of Vincennes, 85 Ill. 423; Felsenthal v. Durand, 86 Ill. 230; Waugh v. Suter, 3 Ill. App. 271; Goodale v. Cooper, 6 Ill. App. 81; Aten v. Brown, 14 Ill. App. 451; Brown v. Tuttle, 27 Ill. App. 389; Ward v. Stanley, Oct. term, 1891.

Having failed to obtain judgment against W. D. Cooper, none could in that action be rendered against H. F. Cooper. The declaration charged them as jointly liable; the judgment upon the trial established that they were not.

Thereafter in that action it was error to render judgment against the co-defendant.

The judgment of the Superior Court is reversed.

Judgment reversed.

Judge GARY took no part in the consideration of this case.

CHARLES W. RIGDON

V.

ALFRED F. WALCOTT.

Fraud—Sales—Corporations—Stockholders—Contracts—Specific Performance.

1. A sale induced by fraud is not absolutely void, but is valid and binding if the innocent party, upon whom the fraud was perpetrated, sees fit to affirm the transaction.

2. If the defrauded party disaffirms the transaction, he must do so *in toto* and must offer to restore the *statu quo*.

3. If, by the conduct of the party guilty of the fraud, it has been rendered impossible for the *statu quo* to be restored, a court of equity will not deny to the innocent party the right of rescission because of such impossibility.

4. Contracts between the controlling majority of stockholders of a corporation, in its behalf with themselves, are not sanctioned by courts of equity. Such contracts courts of equity treat as of no avail; the parties acting thereunder become entitled to receive, not the sum stipulated, but merely a fair compensation for what they have done.

5. The right of one stockholder that all the agents of the corporation shall act, not in their own interest, nor in the interest merely of those stockholders by whose favor they hold their places, but with an eye single to the interests of the corporation, is as great as that of all the stockholders.

6. In the case presented, this court holds, in view of the evidence, that complainant's contract with defendant was not one of which a court of equity would or could compel a specific performance, and declines to interfere with the decree for the defendant.

[Opinion filed December 7, 1891.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

This is an appeal from an order sustaining a demurrer and dismissing for want of equity a bill filed by appellant. The bill was to restore appellant to his rights under a written contract by him made with appellee, by the terms of which, in consideration of what he had already done, and his promise, until the completion of the same, to devote all the time, skill

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and ability necessary to the procurement of an ordinance from the city and to the obtaining of the right of way for the Chicago & South Side Rapid Transit Company, appellee agreed to procure from said company a contract for the construction of its road, by the terms of which appellee should receive for such construction \$7,000,000 of the bonds of such company and 74,995 full paid and non-assessable shares of stock of the par value of \$100 each; and out of such bonds and stock, he, appellee, agreed he would assign to Owen P. Aldis, as trustee, to be by him held until the completion of said road and then to be delivered to appellant, one-thirtieth of all such bonds and one-fifteenth of all such stock, it being recited in such contract that said company was organized under the laws of the State of Illinois with a capital stock of 75,000 shares of \$100 each, appellee having subscribed for 74,995 shares, appellant for one share and four other persons for one share each.

The bill charged that appellant fulfilled his part of the agreement, and that in the month of November, 1889, appellee represented to him that it had become necessary in order that the subscribers to said capital stock might reap any benefit therefrom, to sell a controlling interest in said company to the Chicago City Railway Company, and that the utmost appellant could obtain for the stock and bonds he had acquired under said agreement was \$40,000; that every other person having any interest in said rapid transit company had consented to receive a sum which bore a far less proportion to the stock and bonds of said transit company to which they were entitled, than the said sum of \$40,000 did to the stock and bonds to which appellant was entitled; that believing such representations to be true, and relying upon the same, he entered into an agreement to assign his contract for the sum of \$40,000; that afterward, becoming fearful that the representations were untrue, he filed his bill and obtained an injunction restraining one W. W. Gurley from disposing of or assigning the said contract.

That thereafter said Gurley, at the instigation of appellee, and appellee, renewed said representations and assured him

that they were true, whereupon he dismissed his said bill and consented to receive said \$40,000; that he had no means of ascertaining as to the truth of said representations of appellee and his agents; that each and all of the said representations were false and known by appellee to be false and were made by him for the purpose of deceiving him, appellant, and to induce him to assign his said contract as he did.

That before he made said representations appellee had arranged to dispose of, and after appellant assigned his said contract with appellee, sold to the Chicago City Railway Company, a controlling interest in said rapid transit company, for a price which, as he is informed and believes, would have entitled him, appellant, to have received for the stock and bonds which, under his agreement with appellee he was to have, not less than the sum of \$500,000.

That as he is informed and believes appellee still retains a large number of shares of the said transit company and will become entitled to, under the contract for the construction of the railroad of said company, a large number of bonds of said company, and he asks that the assignment by him, appellant, made of his said contract, may be set aside, and that appellee may be ordered to fulfill his said agreement with him, appellant, and be enjoined from disposing of any stock or bonds to which, under said agreement, he, appellant, is entitled.

The bill was afterward amended by the insertion of the statement that the complainant has expended a considerable portion of the \$40,000 by him received in the payment of indebtedness before that by him incurred in the procuring of the right of way for the said transit company, and that he is a person of limited means and could not raise the sum of \$40,000 to tender to appellee; that under the agreement between him and appellee, there is due to him, complainant, cash, stock and bonds of a value greatly in excess of \$40,000; that the cancellation of the assignment of said contract by complainant and the delivery to him of the said cash, stock and bonds should be simultaneous; and he tenders to appellee out of the same the said \$40,000.

Mr. HUGH L. BURNHAM, for appellant.

Messrs. GURLEY & WOOD, for appellee.

WATERMAN, P. J. It is strenuously urged that it was not necessary to make any tender of the \$40,000 received by appellant other than that contained in the amended bill.

A sale induced by fraud is not absolutely void; if it were each party might disregard it. Such sale is valid and binding if the innocent party, upon whom the fraud was perpetrated, sees fit to affirm the transaction. Changed conditions may, before he discovers the fraud, have made the dealing advantageous to him, and it be for his interest to maintain it; whether this be so or not, he and he alone can avoid the sale. It being therefore voidable only, if the defrauded party disaffirms the transaction, he must do so *in toto* and must offer to restore the *statu quo*. Bowen v. Schuler, 41 Ill. 192; Lovington v. Short, 77 Ill. 587; Preston v. Spaulding, 120 Ill. 208-227. If by the conduct of the party guilty of the fraud it has been rendered impossible for the *statu quo* to be restored, a court of equity would not deny to the innocent party the right of rescission because of such impossibility. Preston v. Spaulding, *supra*.

In the present case, appellant, without showing that it is impossible for appellee to give to him or deposit with Aldis in trust the stock and bonds appellant claims, makes only a conditional offer to pay back the \$40,000 he has received. He alleges that in case he is restored to his right under his contract there will be due to him from appellee cash, stocks and bonds far in excess of the sum of \$40,000, and out of this he offers to restore the \$40,000.

What the amount of cash, stocks or bonds respectively will be, is not stated; and the allegation that the value of all is far in excess of \$40,000 is a mere conjectural opinion. No facts are stated from which any conclusion can be reached as to what amount of stocks or bonds complainant will be entitled to, nor is there any allegation as to what the value of either the bonds or stocks of said transit company now is. If upon a hearing the value of the cash, bonds and stocks going to

complainant should be only \$30,000, then the offer is merely to restore \$30,000.

Appellant, when he filed his bill, was in possession of the facts, concealed, as he alleges, from him when he assigned his contract; he could then have confirmed his assignment or rescinded it, but if he rescinded he must do so *in toto*. Instead of this he offers to give back an amount equal to the value of what shall be restored to him.

If he had offered to restore the \$40,000 upon a return to him of what he was entitled under his contract, appellee might at once have accepted such offer; and appellant might have found that his stock and bonds were of far less value than \$40,000; he seems to have been afraid of such contingency and carefully avoided a tender which might have led to such result. It does not clearly appear from the bill that appellant has ever become entitled to receive from appellee either stock or bonds. True, he says that he was and is, but that is a mere conclusion; facts showing him to be so entitled should have been set forth.

The contract was that appellee should make a contract for the construction of a railroad under which he, appellee, would receive over \$14,000,000 in stock and bonds, and of these appellant was to have a definite portion. There is no allegation that appellee ever made or was able to make any such contract.

It is argued that as appellee held a large majority of the stock of the company, he could make or have made for the company, the contract with himself he agreed with appellant should be made; and that if he neglected to have made with himself such contract he failed to discharge his obligations to appellant, and a court of equity will treat the matter as if he had done what he agreed to.

It may be the case that the controlling majority of stockholders of corporations do often direct contracts to be made on its behalf with themselves, but they do not so do under the sanction of courts of equity. Such contracts courts of equity treat as of no avail; the party acting thereunder becomes entitled to receive, not the sum stipulated, but

Wieska v. Imroth,

merely a fair compensation for what he has done. Redfield on Railways, Sec. 140; Morawetz on Corporations, Sec. 516, 517, 518, 519; Wardell v. Union Pac. R. R., 103 U. S. 651, 658; Hoyle v. Platsburgh R. R., 54 N. Y. 314-328; Bliss v. Matteson, 45 N. Y. 22-26; Gardner v. Butter, 30 N. J. 702, 721, 724.

It is true that appellee held all but a very few shares, but the right of one stockholder that all the agents of the corporation shall act, not in their own interest or in the interests merely of those stockholders by whose favor they hold their places, but with an eye single to the interests of the corporation, is as great as that of all the stockholders.

Appellant's contract with appellee was not one which a court of equity would or could compel a specific performance of.

The demurrer was properly sustained and the decree of the Superior Court dismissing the bill must be affirmed.

Decree affirmed.

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43	533

CHARLES WIESKA

V.

ALBERT IMROTH AND AUGUSTE IMROTH.

Mechanics' Liens—Building Contracts—Statement—Sec. 35, Chap. 82, R. S.

For the lack of a statement in compliance with Sec. 35, Chap. 82, R. S., this court holds that the plaintiff in the case presented can not recover for work performed and material furnished.

[Opinion filed December 7, 1891.]

APPEAL from the County Court of Cook County; the Hon. FRANK SCALES, Judge, presiding.

Appellant, in the spring of 1889, contracted to and did work and furnished materials on the premises of appellees in

Chicago; on the 13th of June, of that year, appellant furnished appellee with a sworn statement of the names of certain material men and laborers, but failed to state the rate of wages of any of the workmen, or how much had been paid to either of them, or the terms of contract with any of them.

The statement as to the workmen was as follows:

"The following named persons were in my employ on said job, viz.: Schultz, Bernard Wieska, Robert Wieska, Otto Pauly, Krampe and Charlie, which all amounts to \$125, and which is paid in full." This was the only statement furnished.

Mr. ARTHUR SCHROEDER, for appellant.

Messrs. LOUIS KISTLER & SON, for appellees.

WATERMAN, P. J. The statement was not a compliance with the statute. It provides that the original contractor shall, whenever any payment of money shall become due from the owner, or whenever he desires to draw any money from the owner * * * on such contract, make out and give to the owner * * * a statement under oath, of the *number, name of every subcontractor, mechanic or workman in his employ or person furnishing materials, giving their names and the rate of wages, or the terms of contract, and how much, if anything, is due or to become due to them or any of them for work done or material furnished.* * * * Until the statement provided for in this section is made in manner and form as herein provided, the contractor shall have no right of action.

The judgment of the County Court that for lack of a statement in compliance with the statute the plaintiff was not entitled to recover, is affirmed.

Judgment affirmed.

"Beveridge v. Parmelee."

JOHN L. BEVERIDGE ET AL.

V.

JOHN W. PARMELEE.

Sales—Mining Refusal—Conditional Payment—Bailments.

1. In an action brought to recover money paid as one-third payment in the purchase of a mining refusal, this court holds that the case was fairly left to the jury upon the question whether the money was paid under an agreement that it should be returned if other parties did not pay the balance, and that the judgment for the plaintiff can not be interfered with.

2. Such being the agreement in a given case, defendants, in a suit based thereon, are personally responsible, especially where they acted for another who was a non-resident.

[Opinion filed December 7, 1891.]

APPEAL from the Circuit Court of Cook County; the Hon. GEORGE DRIGGS, Judge, presiding.

Messrs. HARBERT & DALEY, for appellants.

Messrs. TATHAM & WEBSTER, for appellee.

GARY, J. This is an action to recover the money paid by the appellee to appellants, as shown by this receipt:

"CHICAGO, December 31, 1888.

"Received of J. W. Parmelee, \$833.33, being one-third cash payment in the purchase of mining refusal No. 490 of S. E. $\frac{1}{4}$ N. W. $\frac{1}{4}$, 36—48—28.

\$833.33.

"BRUNSON, MINER & HALL,

"Per Beveridge, Rickards & Co., Agts."

The whole price of the mining refusal was \$2,500, the other two-thirds of which were to be paid by Raymond Brothers. They paid part, but not the whole of it. There is testimony not objected to, though contradicted, that when Parmelee paid the money to Rickards, one of the appellants, it was agreed between them that if Raymond Brothers did not pay

their part, the money paid by Parmelee should be paid back to him. Whether such testimony was admissible is not made a question in the case. It was also proved that before this suit was commenced—but whether before appellants sent the money to Brunson, Miner & Hall, was disputed—Parmelee demanded the money of the appellants.

The instructions given and refused are too long to quote and discuss, but in effect the case was fairly left to the jury upon the question whether the appellants received from the appellee the money sued for, under an agreement that they would return it if the Raymond Brothers did not pay the balance of the \$2,500. If that was the agreement the appellants are personally responsible. *Mead & Coe v. Altgeld*, 33 Ill. App. 373; 26 N. E. Rep. 388. More especially, as the appellants' principals resided out of this State.

There is no preponderance of evidence against the verdict, and the judgment must be affirmed.

Judgment affirmed.

CLARENCE I. PECK

V.

SCOVILLE MANUFACTURING COMPANY.

Landlord and Tenant—Lease—Conditions—Sum Paid Out by Tenant for Repairs.

1. The rule that where there is an inconsistency, the written portions of a contract will prevail over the printed, has no application where there is no inconsistency, and does not do away with the rule that effect is, if possible, to be given to every portion of the contract.

2. A tenant bound to restore premises named, in good order, "loss by fire or inevitable accident, or ordinary wear excepted," is obliged to repair a window broken by a stone accidentally kicked by a passing team.

3. In such case, the burden of proving that the window was broken by inevitable accident, is upon the tenant.

[Opinion filed December 7, 1891.]

Peck v. Scoville Manufacturing Company.

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

Appellant leased to appellee certain premises in Chicago. The following portion of the lease was in writing:

“Said party of the second part shall keep the roof of said building clear of ice, snow and rubbish; shall not permit telegraph or telephone companies to attach wires to said building without written permission from said party of the first part; shall keep the elevators in said building and all attachments thereto, including hand and lifting cables, at all times properly oiled to prevent rust and wear; shall keep water shut off at proper times to prevent freezing, and repair damage to plumbing or other portions of said building through neglect or carelessness; shall keep all packing of cylinder and all other parts of elevator in proper condition, and renew packing as worn out.”

The following portion was a part of the printed form:

“And the said party of the second part further covenants with the said party of the first part, that said party of the second part has received said demised premises in good order and condition, and that at the expiration of the time in this lease mentioned, or sooner determination thereof by forfeiture, he will yield up the said premises to the said party of the first part in as good condition as when the same were entered upon by the said party of the second part, loss by fire or inevitable accident or ordinary wear excepted; and also will keep the said premises in good repair during this lease at their own expense.”

Thirty dollars of the rent for April appellee refused to pay because it had paid out that sum for repairs. Thereupon appellant brought suit.

George B. Kerr testified on behalf of the defendant:

“Am the agent of defendant; refused to pay the said sum of \$30 because a window was broken without any fault of theirs and it cost that sum to have it repaired, and took out the cost of the same from April rent. I am not able to say how the window was broken except that a stone did it. I saw

no one throw it. It might have been broken by a stone kicked by a passing team; I think the window was broken in that way but don't know, and I have seen stones kicked across the street by passing teams."

Cross-examined by Mr. Maher: "The stone was a piece of rough limestone about as large as a man's fist. Lake street is a paved thoroughfare. The window is up about four feet above the sidewalk, which, between the window and the street, is about twenty feet wide. The window is on the north side of Lake street fronting the street."

The finding and judgment were for the defendant, and the plaintiff brings this appeal.

MR. EDWARD MAHER, for appellant.

MESSRS. TOLMAN & SIMONS, for appellee.

WATERMAN, P. J. The rule that where there is an inconsistency, the written portions of a contract will prevail over the printed, has no application where there is no inconsistency and does not do away with the rule that effect is, if possible, to be given to every portion of the contract. There is no necessary inconsistency between the written and printed portions of this lease. *King v. Driss*, 5 Robertson (N. Y.), 521.

Appellee was bound to restore the premises in good order, "loss by fire or inevitable accident or ordinary wear excepted."

A window broken by a stone accidentally kicked by a passing team is not broken by *inevitable* accident. The kicking of the stone, so far as appellee is concerned, may have been inevitable, but not the breaking of the window; that might have been protected by a blind or wire netting.

The burden of proving that the window was broken by inevitable accident was on appellee; this it failed to do.

The judgment of the Circuit Court is reversed and the cause remanded.

Reversed and remanded.

BERNARD CONLON, FOR USE, ETC.,
V.
PATRICK MANNING.

Practice—Appellate Court Rule No. 15.

This court declines to consider any question in the case presented, there being no assignment of errors as required by the rules hereof.

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74	457
43	363
77	577

[Opinion filed December 7, 1891.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

Messrs. MASTERSON & COFFEY, for appellant.

Messrs. KRAUS, MAYER & STEIN, for appellee.

Per Curiam. In this appeal there is no assignment of errors on the record or elsewhere on any paper in the case. Rule 15 of this court requires that the appellant or plaintiff in error shall in all cases assign errors at the time of filing his record in this court, and on failing to do so the case may be dismissed. * * * This assignment of errors and cross-errors must be written upon or attached to the record. It was said in *Williston v. Fisher*, 28 Ill. 43, "An assignment of errors in this court performs the same office as a declaration in a court of original jurisdiction. It would be just as regular and proper for the Circuit Court to render a judgment in a cause where there is no declaration, as for the court to affirm or reverse a judgment where there is no assignment of errors."

In *Ditch v. Sennott*, 116 Ill. 288, it was said: "The failure to assign errors upon the record is not a mere form that will be considered waived if not objected to, but one of substance; and should the court, for instance, inadvertently reverse a case for an error not assigned, it would feel com-

pelled on motion to set aside its judgment." See also Harrison v. Waixal, 35 Ill. App. 511.

We have no power to consider any question in the case, therefore the appeal will be dismissed.

Appeal dismissed.

CHARLES E. CARLSON

V.

LEOPOLD NATHAN.

Sales—Real Property—Agency—Commissions—Recovery of.

In an action by a broker to recover commissions upon a sale of real estate, this court holds there can be no recovery, the plaintiff's efforts to procure terms which the defendant would accept having failed, and the trade finally made having been brought about by other influences after the plaintiff had abandoned the business.

[Opinion filed December 7, 1891.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Messrs. BLANKE & CHYTRAUS, for appellant.

Messrs. HOFHEIMER & ZEISLER, for appellee.

GARY, J. This is an action of assumpsit by the appellee against the appellant for commissions as a broker upon the sale of real estate.

Carlson had some improved property incumbered for \$18,000, and employed Nathan to dispose of it. Through a clerk, Nathan brought the property to the attention of John A. Linn, who had some unimproved and unincumbered property. Nathan told Carlson to go and see Linn, but he did not do so, though he did look at Linn's property.

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Harder v. Rohn.

The best offer that Nathan was able to obtain from Linn was on the basis that Carlson's property was worth \$12,500 more than Linn's, and that came through a clerk. Carlson would not accept it. Nathan himself saw Linn but once, and then they quarreled. All negotiations ceased, and nobody concerned had any further thought of a trade.

Carlson and Linn had not met. More than a month thereafter, both of them being customers of the same banker, they were introduced to each other by that banker; spent several hours together, and finally agreed upon a trade upon the basis of \$15,000 difference in value.

Upon such a state of facts the appellee was not entitled to commissions. His efforts to procure terms which Carlson would accept failed.

The trade finally made was brought about by other influence, after he had abandoned the business. While the case of *Davis v. Gassette*, 30 Ill. App. 41, is not like this upon the facts, the principle of it, and the authorities there cited, apply.

The judgment must be reversed and the case remanded.

Reversed and remanded.

WILLIAM HARDER ET AL.

V.

CHARLES ROHN.

Creditor's Bills—Fraudulent Conveyance to Debtor's Wife—Laches.

1. Upon a bill filed to subject certain real estate to the payment of a judgment obtained against a married man, the same having been conveyed by himself and wife to a third party, who in turn conveyed it to the wife, this court holds, in view of the evidence, it being claimed that the premises were a homestead, and bought with the wife's money, that the amount of money so invested by her should be ascertained, and that to such extent, in addition to \$1,000 for the homestead, if the premises should be sold, she is entitled to be paid, but without interest.

2. Should property in such case be sold, the homestead may be claimed under the statute at the sale.

3. This court holds that no *laches* is imputable to the plaintiff in suffering several years to elapse before attempting to assail the validity of the conveyance in question.

[Opinion filed December 7, 1891.]

IN ERROR to the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

Mr. HIRAM BARBER, for the plaintiffs in error.

Mr. J. S. HUEY, for defendant in error.

GARY, J. February 8, 1888, Rohn recovered in the Superior Court a judgment against William Harder for \$892 and costs, and execution therein being returned *nulla bona*, he filed the bill in this case, the object of which is to subject to the satisfaction of that judgment some real estate which William and his wife, Bertha, conveyed to one Schroeder in 1876, and which Schroeder conveyed to her in 1885. The decree appealed from ordered a sale of the property to pay the judgment.

In their answer the plaintiffs in error claimed that the premises were bought with her money, and also that they were a homestead. As to the latter claim, while if, as it is not made definite which part they so claim, it may be good to that part, or to the extent of \$1,000 in the value of that part, it can not be good for the whole. The premises are fifty feet front on Wells street, with two houses on them, stores below and dwellings above. The homestead, however, may be claimed, under the statute, at the sale. *Ammondson v. Byan*, 111 Ill. 506; *Asher v. Mitchell*, 92 Ill. 480.

The proof is rather vague, though perhaps if that were the only question, it might be deemed sufficient, that the indebtedness upon which the judgment was rendered existed before the conveyance to Schroeder, and it is quite clear that if that conveyance was not merely to defraud creditors of William Harder, the only honest purpose in making it was as some security to Schroeder for indebtedness of William Harder to

Burt v. Wrigley.

him. The property in the latter case belonged to William Harder, subject to the incumbrance, and in the former, was wholly subject to the claims of the creditors of William Harder, and in neither case would a conveyance without consideration, by Schroeder to Bertha Harder, screen the property from the claims of the creditors of her husband.

There is, however, proof in the record that after the "Married Woman" law of 1861 went into effect, she received from the estates of deceased relatives in Germany, amounts of money which went, directly or indirectly, into the purchase of these premises. What money of hers so went should be ascertained, and to that extent, next after the \$1,000 for the homestead, if the premises should be sold, she is entitled to be paid (*Phelps v. Curts*, 80 Ill. 109; *Lubstein v. Lehn*, 20 Ill. App. 254), but without interest. She put the money into the property to enjoy the property, not to draw interest. It is probable that the error in not giving her that preference is of no practical consequence, as the value of the premises must doubtless be more than enough to pay her and the homestead claim, as well as the defendant in error.

No *laches* in seeking his remedy is imputable to him. The decree is reversed and the case remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

WILLIAM H. BURT
v.
WALTER S. WRIGLEY.

*Negligence—Personal Injuries—Building in Process of Construction—
Notice—Appeal and Error.*

1. In an action brought to recover for personal injuries alleged to have occurred through the negligence of the owner of a building in process of construction, this court declines, in view of the evidence, to interfere with the judgment for the plaintiff.

2. This court holds as proper the refusal of the trial court to permit defendant's witnesses to answer certain questions, such questions simply calling for their opinions.

[Opinion filed December 7, 1891.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Appellant having given to his daughter a lot on West Monroe street, in the city of Chicago, built a house thereon. Certain steps leading to the basement of the house projected a short distance into the street; in putting in these steps an excavation was made under and a portion of the sidewalk removed.

While this work was going on, appellee, in going in the evening past the premises of appellant, and not noticing any obstruction, stepped into a hole in the sidewalk made in the course of the doing of the work ordered by appellant. Appellee's leg was badly bruised and he was confined to his house for some time. As to the condition of the walk at the time of the accident, the testimony was conflicting, as was also the evidence as to the condition in which the walk was left at the close of work on that day, and the lights burning and danger signals existing at the time appellee was injured.

Suit having been brought against appellant, the mason who did the work, and the city of Chicago, upon the trial the plaintiff dismissed his suit as to the city, and the jury found the mason not guilty, and appellant guilty, assessing the damages at \$500.

There was judgment upon the verdict and the defendant, Burt, prosecutes this appeal.

Messrs. CASE, HOGAN & CASE, for appellant.

Messrs. HYNES & DUNNE, and J. W. DUNCAN, for appellee.

WATERMAN, P. J. It is urged that appellant had no notice of the dangerous condition of the walk, and consequently no recovery can be had.

As the work was ordered by appellant and done under his daily supervision, the rule as to notice, existing in the case of municipal corporations who are only bound to the exercise of reasonable diligence in ascertaining defects and keeping public streets in a safe condition, has no application to this case. Nor is this one of those instances in which a person having let work to competent contractors, relinquishes to them such entire control over his premises and the work that he is not responsible for injuries the result alone of their negligence. There is no evidence that appellant surrendered control over either the work or his premises.

If it were clearly established that all necessary precautions in the way of coverings, guards, lights, etc., had been placed by appellant, and that the accident had been caused by the removal by some unauthorized hand of some of those coverings, lights or guards, without notice to appellant, and at such a time before the accident that no duty of inspection could be charged upon appellant, then the case would be analogous to that of *Martin v. Pettit*, 117 N. Y. 118. As it was, the question of appellant's negligence, if any, and of appellee's exercise of care, was fairly debatable, and the verdict of the jury can not be said not to be sustained by the evidence.

The witnesses called by the defendant to show the condition of the walk seem to have testified fully as to their knowledge upon that matter, and we do not think the defendant was injured by the refusal of the court to permit them to say whether, if any boards had been absent so as to leave an open space, they would have noticed it. The answers, if given, would have been mere matters of opinion. *Sahlinger v. The People*, 102 Ill. 241-248.

There is not the inconsistency suggested between the acquittal of the mason who did the work and the finding of appellant guilty. The mason left the premises on the 22d of November; the accident happened December 3d. It was for a negligent condition existing December 3d, that appellant was sued; that this had existed since November 22d, the jury might not have thought. The jury were fairly instructed and the damages are not excessive.

We find no error requiring a reversal of this judgment and it must be affirmed.

Judgment affirmed.

MARY W. ALBEE
v.
CHARLES S. ALBEE.

Divorce—Desertion—Wife from Husband—Non-resident.

1. It is not to be laid down as settled law that a wife must live with her mother-in-law, or upon refusing to do so, be divorced for desertion.
2. An agreement by a woman before her marriage to live when married in the house of and with her mother-in-law is of no force; all such promises are merged and obliterated by the marriage contract.
3. In the case presented, this court holds, in view of the evidence, that complainant is not a *bona fide* resident of the State of Illinois.
4. The statute requiring residence, should have a strict construction.

[Opinion filed December 7, 1891.]

APPEAL from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

Mr. H. F. WHITE, for appellant.

Messrs. BISBEE, KERN & REED, for appellee.

MORAN, J. We have examined with care the evidence in this case and have come to the conclusion it does not warrant the decree entered in the court below. The bill is filed for divorce on the ground of desertion. The evidence shows that the parties were married at Bellows Falls, Vermont, in October, 1885. At the time of the marriage, appellant was running a small millinery store at Bellows Falls, and appellee, who was the only child of his parents, was working on the farm of his father and living with his father and mother on said farm a

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few miles from Bellows Falls. After the marriage, the young couple went to live in the house with his parents, though the wife continued her business in Bellows Falls, going back and forth every day. As is not unusual in cases where the son brings his wife to his mother's house to live, the daughter-in-law and mother-in-law did not get along pleasantly and appellant sought to induce her husband to take rooms in the village and live there, and offered to pay for them herself. This he says he was ashamed to do and leave his good home. She testifies that she suggested to him that his father might build a home for them and pointed out a place on the land where it could be built, and he said that his father was willing to do it, but his mother said no, there should be no other house built, that if the house was not large enough for appellant, she could get out and leave it.

In March, 1886, they talked about going to some other place to live. She wanted to go to Rutland and persuaded him strongly to go. He was reluctant, and testifies that he did not consent to her going, but she swears that he did consent to her going and promised to go with her. It is agreed by both that he took her to the depot one Saturday when she started to Rutland, and that he packed up her goods and furniture and brought them to Rutland, where he went on the following Thursday and joined appellant and lived with her at her father's house. He obtained employment in Rutland and remained there, living with her till June 28th, when he went home to his father. He testifies that he wanted her to go back with him to live there, but her story is that he told her that his people wrote him that they were lonely and sick, that he was out of work in Rutland, that he thought he would go and help his father through haying, and asked her to come over after the fourth of July and spend the vacation when her busy season in her business was over. It is agreed by both of them that she did follow about July 4th, taking with her merely some dresses to wear, but no furniture, and that she remained living with him at his father's for some five weeks. She returned in August, and shortly thereafter he called for her at Rutland and they went to Saratoga Springs, and then

returned to his father's, where she remained living with him till about September 2d. She testifies that his mother made it very unpleasant for her during this time. She would say to her that she thought she, appellant, would want to go back and attend to her business, that if she stayed away from her business so long, she would not know what would become of it. Some of the time the mother-in-law would not speak to her; if appellant came out on the porch where she was, she would leave and go inside. When appellant left to return to Rutland on September 2, 1886, appellee drove her to the depot. She testifies that when they were leaving, his father and mother were in the yard, and her husband asked her if she noticed that they did not invite her to come back. He said, "I'll give mother hell for that." She said, "Don't, for my sake," and he said, "They can't treat you like that and have it go with me." In his denial of this on rebuttal he contents himself with denying that he said he would give his mother hell. He says she left this time against his will. She says he consented and was to come to Rutland to her. She testifies that he came to Rutland in September, and said he would try to get work. This he denies, but both agree that he was there in October, on the anniversary of their marriage, and again during the same month when she was sick, and stayed some days living with her, and she says he told her he must go home, as his folks thought he was in Boston, instead of Rutland, and that he promised her to return in two weeks and bring her back to the farm, where she says she consented to go. He says that he went to see her in October but that he had a letter from her in September (the contents of which he gave from memory, the letter being lost), in which she told him if he wanted to see her, he must come to Rutland, as she had left Bellows Falls for the last time.

She wrote him several letters from October to December, 1886, which he says he received, but she says she received no replies to them and he does not pretend that he wrote any. Fearing that he did not receive her letters in December, the week before Christmas she went to Bellows Falls and went to his mother's house and asked for him and the mother said he

was down at Russell's farm, and appellant went down there and saw him, and he asked her what she was doing there. She asked him why he had not answered her letters, and he said he had not time and that he did not intend saying anything, that he had said all he intended to. She testifies that he then said he would come to the hotel for her that afternoon and take her up to the house. He did not come and she remained at the hotel all night. The next day being Sunday, she sent a message to him at his mother's house, but his mother said he was not at home. That Sunday evening appellant walked two miles to the farm where appellee was working, but his boss said he did not know where he was. On Tuesday she went to his mother's house to see him and his mother came to the door and said, "Charley is not at home, and if he was I would not let him see you. He don't want you. You have made trouble and we don't want to see you."

Appellant remained at the hotel for several weeks, waiting to see him, but he was away. In January she learned he was at Barre, ten or twelve miles away, and she went there and found him. He wanted to know how she knew he was there. She swears she asked him why he did not come after her to Rutland and he said he had changed his mind and he had no place to take her to, "only up home, and you don't want to go there." I said, "I have not refused to go there." He said "They don't want you there now. I don't think mother would have you there now." She further says that she never refused to live with him at his father's house, but she does not pretend to deny that she did not want to do so. She swears that in this interview, in January, 1887, she said to him that she would sell out her business and give the money to him, so that he might provide a home for her. He said, "Is that an insult? You have a good home and can stay there." She said, "I left that home for you; I did not marry the home, I married you, and if I can't be with you, I don't want to live." He said, "Go home and stay, and when I am ready I will send for you." She said, "I would live in your father's sheephouse, if you will put the windows in; I will live anywhere to be happy with you." He asked her if that was another insult. She

asked him to drive her back to Bellows Falls, but he said he had an appointment, but would come to the hotel at 7:30, and take her to his father's house, but he never came. She stayed about a week longer in Bellows Falls, but hearing nothing from him, returned to Rutland. He testifies that he was informed by third parties that she was staying near Bellows Falls in December. That he went to the Barre place on December 30th, but did not go to avoid seeing her. That he saw her when she came over in January and that she wanted him to go to Rutland and come for that purpose. He said he had no business at Rutland, but if she would come back to Bellows Falls and live at his home as per agreement, they would be on the road in five minutes.

It is perfectly apparent from the record that the only subject of difference between these parties at any time, was as to the matter of their living in his father's house with the old people. She loves her husband and has evidenced by her conduct a strong desire to live with him instead of deserting him. He finds no fault with her except that she would not live at his home, that is, with his father and mother. It is undoubtedly true that she did not desire to live there and did all in her power to persuade him to live with her somewhere, in fact, anywhere else. She wrote the letter in September that she had left Bellows Falls for the last time, as a means of inducing him to find her another home, but that she did not mean by what she said to desert her husband is shown by her conduct in December and in January following. The particulars of what preceded and followed the letter and what occurred at the time of her departure before the letter was written are important to be considered, and these proceedings and attendant circumstances negative the inference of an intention to desert. Besides, it is not to be laid down as settled law that a wife must live in the house of her mother-in-law or be divorced from her husband for desertion. Much stress is laid on the fact that before the marriage she agreed to live at his mother's house. Such an ante-nuptial contract is of no force; all such promises are merged and obliterated by the marriage contract which bound the husband to "leave father and

mother and cleave to his wife.” It is proved that the house was large and comfortable, but his wife wanted more than mere space and convenience. She wanted peace of mind and happiness and was willing to live with him in his father’s sheephouse in order to be happy. In *Powell v. Powell*, 29 Vt. 148, where a wife persisted in her refusal to live with her husband near his relations and he persisted that she should do so, that being the only cause of separation, it was held not to constitute willful desertion on the part of the wife. While the court recognizes the right of the husband to determine the abode of the family, and that it is in general the duty of the wife to submit to such determination, yet this, says the court, is not an entirely arbitrary power on the part of the husband. He must use reason and discretion. “Any man who has proper tenderness and affection for his wife would certainly not require her to reside near his relatives if her peace of mind were thereby seriously disturbed.” And further the court says, “Every one at all experienced in such matters knows that it is not uncommon for the female relatives of the husband to create, either intentionally or accidentally, disquietude in the mind of the wife and thereby to destroy her comfort and health.” This is the wisdom of the Supreme Court of appellant’s own State, and if he had heeded its suggestion he need not be a “stranger in a strange land,” seeking a divorce from a loving wife whose only fault seems to be that she could not live in peace with his mother. The letter of September in which she says to her husband that she has left Bellows Falls for the last time, was evidently regarded by appellant as a point of great importance in his case. The date of that letter is taken as the commencement of the desertion. His mother saw it and is able to repeat its contents verbatim after the lapse of more than two years. When he came to Chicago to procure his divorce, this letter was shown to his friends here, and one of them testifies to its contents. After the receipt of this letter, he assumes a new attitude toward his wife, his mother is more frank and outspoken in her statements to her, and they all conduct themselves as though they had got a point and were inclined to hold on to it. The approaches of

the wife when she comes to Bellows Falls are coldly received, he has business away from home, and his mother "would not let her see him if he was home." The mother testifies that at this time there was unpleasant talk between them; that appellant said that she, the mother, was the biggest liar in town, and that she told appellant that said appellant had deceived Charles from the beginning of their married life to the present time about owing money, etc. "Then she talked very hard to me and I came into the house." Appellant, having said she would not come back, was to be kept to her word. She would be allowed no *locus penitentia*. Her letter was the basis of a case for desertion. The home in which her husband insisted she should live was made more cold and repellant to her, and her husband, when she sought him, found occupation ten or twelve miles away, and when found by her, his question is, how she found out he was there. Under such circumstances the one who is away from the home may be truly said to be the deserted one and the one who remains the deserter.

But there is another reason why the decree must be reversed. We are compelled to the conclusion that appellee is not a *bona fide* resident of this State; that he came here away from his home in Vermont for the mere purpose of obtaining a divorce. At the end of about two years from the date of the September letter, appellee came to Chicago. He came in September, 1888, and as he says "went down home" early in December, and came back here in August or September, 1889, and immediately filed a bill for divorce. He then remained here till early in the winter of 1889, when he went back to his father's in Vermont and stayed till March, 1890, when he again came to Chicago and remained till July. Then he went home to Vermont, and spent a month and returned here, where he remained till this case was tried in July, 1891. In the meantime his first bill was dismissed and this bill was filed in September, 1890.

The case shows that he is the only son of a farmer who has a farm of 200 acres of land; that his parents desired him to live with them and that he felt he could not live anywhere

away from them even to make his wife happy. He has no trade, is only a farmer, and part of the time that he has been living in Chicago has worked for his board. He has been sick about two-thirds of the time while he has been in Chicago, and the best wages he has been paid when he worked was \$2 per day, and he pays \$6 per week for board. The man who employs him and with whom he boards is a relative. He swears now that he does not know what the desires of his parents are with reference to his return to their home. It does not appear that he ever had ill health there, and it is shown that he could earn at least \$20 per month and board. No reason is given for this change in his sense of filial duty and the indifference of his parents as to his living with them, nor as to why the sentiments of the family on that question should alter just two years from the date fixed as the commencement of the desertion. It may be that the period has some relation to the fact that in this State, which seems to have been selected by him as the forum of his divorce suit, two years' desertion is a ground for divorce, while in the State where his home is, three years is the period.

The conviction is forced upon us from a consideration of all these circumstances, that he is a mere sojourner here, till his divorce might be obtained. The statute requiring a residence in this State should have a strict construction for the sake of the good name of the State if nothing more, and no encouragement should be held out to such as come here away from their homes and the domicile of the defendants to trouble our courts with their marital infelicities. *Hitchins v. Hitchins*, 41 Ill. App. 82. The residence of this defendant is not *bona fide* and on the merits he has made out no case.

The decree will be reversed and the bill will be dismissed.

Decree reversed.

JOHN M. FISCHER AND CATHERINE FISCHER

V.

FREDERICK SPANG.

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51 102*Contracts—Appellate Court Rules and Practice.*

1. No joint liability exists upon separate individual contracts although for the same matter.

2. Parties can not be sued jointly before a justice who can not be so sued in a court of record on the same cause of action.

3. It can not be presumed that by permitting an action of assumpsit to be brought upon a sealed instrument, the legislature intended to make joint contractors of those who separately, part by deed and part by parol, had engaged for the same thing.

4. It is the professional duty of counsel to know the condition of the records of the causes in which they are engaged, and if they by their conduct lead the court to assume a particular condition, and the court has acted upon that assumption, the court will not go back upon itself, unless justice requires it.

5. If parties to a suit expressly or tacitly waive compliance with a rule of this court, it may in its discretion permit them to proceed upon the real merits of the controversy between them.

[Opinion filed December 7, 1891.]

APPEAL from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding.

Mr. ARTHUR SCHROEDER, for appellants.

Messrs. W. HECKMAN & J. G. ELSDON and ALFRED RYORS, for appellee.

GARY, J. This action was commenced before a justice. The appellants by pleas put their joint as well as separate liability in issue. The appellee sued for carpenter work, etc., done under a written contract beginning and ending thus:

“LAKE VIEW, ILL., April 15, 1891.

“Contract between Frederick Spang, party of the first part,

Fischer v. Spang.

and John Martin Fischer and Catherine Fischer (his wife),
parties of the second part. * * *

“In witness whereof we have hereunto set our hands and seals, the day and date above written.

“ [Signed] FRED SPANG, [Seal.]
 JOHN M. FISCHER, [Seal.]
 [Seal.]”

The record contains no evidence showing to whom the premises on which the work was done, belonged. The reason why the wife did not sign the contract is disputed between the parties.

The second instruction for appellee was: "The court instructs the jury that if they believe from the evidence, that Spang made a verbal agreement with defendant Catherine Fischer and a written agreement with the defendant John M. Fischer to do certain work, and that the premises where such work was to be done belonged to both of the defendants, and that Spang proceeded with such work and received from them money on account thereof, even though the jury should further believe from the evidence that Catherine Fischer did not sign or was not a party to the written agreement offered in evidence, still the jury should find the issues for the plaintiff and against both the defendants, provided the jury shall further believe, from the evidence, that there is a balance due to the plaintiff under such agreement."

If joint liability could follow joint ownership, as the instruction assumes, there is no proof of such joint ownership, and while probably no case can be found that does in terms decide (though it is assumed in *Lee v. Nixon*, 1 A. & E. 201, and *Collins v. Prosser*, B. & C. 682,) that there is no joint liability upon separate individual contracts, although for the same matter, upon principle it is so clear, that we do not hesitate to make one.

This action having been commenced before a justice, was in form whatever the evidence would fit. *Steele v. Hill*, 35 Ill. App. 211; *Block v. Blum*, 33 Ill. App. 643.

But parties could not be sued jointly there, who could not be so sued in a court of record on the same cause of action.

For anything done under the contract under seal, signed by John M. Fischer, he could not, before a recent statute, be sued in assumpsit (1 Chitty on Plg., 103, 115); and if Catherine Fischer was liable on a verbal contract, she could be sued only in that form. It can not be supposed that by permitting an action of assumpsit to be brought upon a sealed instrument, the legislature intended to make joint contractors of those who had separately, part by deed and part by parol, engaged for the same thing.

It is by no means clear upon the evidence that the appellee ought to recover anything from anybody on the merits of the case.

For the error in the instruction the judgment is reversed and the cause remanded.

Reversed and remanded.

[*Upon rehearing, opinion filed March 19, 1892.*]

GARY, J. Without sufficiently considering the conduct of this cause, a rehearing was granted because no errors were assigned upon the record.

Such assignment is required by Rule 15, but there is no statute upon the subject. If the parties expressly or tacitly waive compliance with a rule of the court, there can be no doubt that the court, in its discretion, may permit them to proceed upon the real merits of the controversy between them. *East St. Louis Union Ry. v. City of East St. Louis*, 39 Ill. App. 398; and it may refuse, as in *Waixel v. Harrison*, 35 Ill. App. 571, which last case would have been followed in this, had we observed the failure to assign errors. But here the counsel of the appellants in his brief argued that specific errors were committed, and the counsel for the appellee in his brief argued that there was no error, and no allusion was made to, nor did the court observe, the lack of an assignment of errors.

Under the old practice in the Supreme Court a joinder in error was required, and if not put in, the appellant or plaintiff in error might have the judgment reversed or the cause heard

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ex parte, at his election. Rule 17, 40 Ill. XIV. But if a cause was submitted by both parties without such joinder, it was waived. Phelps v. Funkhouser, 40 Ill. 27.

We now think that no rehearing should have been granted in this cause. It is the professional duty of counsel to know the condition of the records of the causes in which they are engaged, and if they by their conduct lead the court to assume a particular condition, and the court has acted upon that assumption, the court will not go back upon itself, unless the real justice of the case clearly requires such retreat.

We hold that the errors argued in the briefs are to be treated, under the circumstances, as substitute for assignments on the record, and the judgment is reversed and the cause remanded on the former opinion.

Reversed and remanded.

SAMUEL G. McCAUSLAND ET AL.

V.

THE WHEELER SAVINGS BANK.

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Commission Merchants—Draft—Promise to Accept—Shipments of Live Stock.

1. A consignor may always direct as to the disposition of the net proceeds of a consignment.

2. If a consignee takes a consignment with knowledge that a draft has been drawn against it, he can not retain the consignment or its proceeds, and repudiate the draft.

3. If commission merchants are notified by a shipper that a draft in favor of a third person is to be paid out of the proceeds of goods shipped, such notification in connection with the draft amounts to an appropriation of the proceeds to the payment of such draft.

[Opinion filed December 7, 1891.]

APPEAL from the Circuit Court of Cook County; the Hon. GEORGE DRIGGS, Judge, presiding.

Appellants were parties doing business as live stock commission merchants at the Union Stock Yards at Chicago; appellee is a banker at Brookfield, Missouri.

One F. M. Harrison in the latter part of 1887 went from Chicago to Brookfield and began to purchase stock and ship it to appellants. Before going he told appellants that he had \$200 in cash and that he wished to buy stock and ship to them for sale, and wished to know if they would honor his draft for \$2,000. They told him they would.

Harrison went to the bank, met A. J. Wheeler, its president, who knew him, and said to Wheeler that he wanted \$2,000 with which to pay for stock and asked him to ascertain if appellants would pay his draft on them for that amount.

December 2, 1887, Wheeler telegraphed to appellants and they replied that they would pay Harrison's draft for \$2,000. Harrison thereupon drew his draft on appellants for \$2,000 and the bank gave him the money thereon. The draft was duly honored. A. C. Arnold, the son-in-law of Harrison and an employe of appellants, was at Brookfield in the spring of 1888 and told Harrison that he had made arrangements with appellee to pay any drafts that he, Harrison, "thought he could do any good with the money in buying stock." Arnold at the same time drew on appellants, through appellee, for some \$6,000, and gave Harrison the money, which he paid for stock. Arnold introduced one party to appellants as his partner and told appellee that at any time Harrison wanted two or three thousand dollars to let him have it and he would see it was all right. Thereafter from time to time Harrison made drafts on appellants and got them discounted by appellee. His manner of doing business seems to have been to pay a little money on the stock when he purchased it, the balance when it was delivered. When he found out the amount he was going to ship he would go to appellee, make a draft on appellants and on it get the amount needed to pay for the stock. In a number of instances he obtained from appellee money with which to go out and purchase stock without making any draft on appellants.

Appellee did not take a bill of lading with any of the drafts,

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and they were discounted by it before the cattle were actually shipped. Appellee understood that Harrison was buying and shipping stock to appellants and that all the money it let him have was for such purpose.

Harrison, upon cards sent to him by appellants, represented himself as their Western agent. A. C. Arnold's name was on their card as "Special." He was, however, only an employe of appellants, receiving a salary and a half commission on his trade.

December 27, 1888, Harrison having told appellee that he would soon want money enough to handle six car loads of stock, appellee thinking this would require some \$6,000, wrote to appellants as follows:

"BROOKFIELD, Mo., Dec. 27th, 1888.

McCAUSLAND, HOAG & Co., Chicago, Ill.

Gentlemen: We have now, for a year or more, furnished currency to Mr. F. M. Harrison, of Bucklin, Mo., upon his individual check. Now he informs us that he will soon want money enough to handle six car loads of stock. Now, notwithstanding all our business transactions with Mr. Harrison, which have been perfectly satisfactory, yet we feel a delicacy in furnishing so great an amount without some security or assurance of pay. Now, gentlemen, the point is, will you protect his checks made on you?

Yours, etc.

R. J. WHEELER, Pres."

Mr. Wheeler says he wrote this because he understood that the arrangement made by Arnold was only as to drafts for two or three thousand dollars.

He received the following reply:

"CHICAGO, ILL., 12/29th, 1888.

R. J. WHEELER, President Wheeler Savings Bank, Brookfield; Mo.

Dear Sir: Yours at hand. We would not obligate ourselves to pay any man's drafts for an indefinite amount.

Yours, etc.

McCAUSLAND, HOAG & Co."

The amount realized by appellants for the stock shipped to

them by Harrison was not always enough to pay his draft and Harrison's account with them thus became overdrawn, until on December 20, 1888, it was overdrawn \$1,719.29.

December 24, 1888, Harrison drew on appellants for \$1,337.33 in payment for two car loads of stock shipped to them; appellee discounted this draft for Harrison and on December 27, 1888, Harrison drew on appellants for \$402 in payment of the amount for which he had given parties checks on appellee for stock, which checks had not been presented to the bank for payment at the time the draft for these two car loads was made. The money to pay for the stock represented by these two drafts was furnished by appellee and the stock was shipped to appellant. The stock was received by appellants and sold by them, and on December 28th, out of the proceeds, they credited Harrison's account with \$460.27. On December 29th, out of the proceeds of this stock last shipped, they credited Harrison's account with \$907.86; the cattle were received the day they were sold. Appellants refused to accept or pay these drafts, which were the last of some twenty made by Harrison upon them and discounted by appellee. December 26th Harrison wrote appellants: "I ship you one load of cattle to-night. All the hogs failed to get in, but will be in to-morrow. Will ship them as soon as they come in. I drew draft on the house \$1,337. Started the stock to get in by the time the stock would."

Mr. McCausland testified that in the general course of events he must have seen this letter on the 28th or 29th of December, the day after or the day it arrived. Appellants honored all of Harrison's drafts up to the one of December 24th. They knew that he had shipped stock at that time, and one of the appellants testifies that he thinks they knew that Harrison had made a draft against it. Harrison had always made drafts on appellants for every consignment of stock, and when they got the draft of December 24th they knew it was against the stock. They understood that Harrison was buying stock, and that when he wanted to pay for it, he went to appellee and made a draft on them for the amount and then shipped the stock to them.

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Suit being brought upon these two drafts, appellee, on the 17th of July, 1891, recovered judgment for \$1,537.83.

Mr. JOSEPH B. LEAKE, for appellants.

Messrs. CRATTY BROS., for appellee.

WATERMAN, P. J. If a consignee takes a consignment with knowledge that a draft has been drawn against it, he can not retain the consignment or its proceeds and repudiate the draft. *Hall v. Bank*, 133 Ill. 234; *Jones on Liens*, Sec. 61.

Whether appellants took the consignment of the last two cars of stock shipped by Harrison with notice that a draft or drafts had been drawn against such shipments, was a question of fact, which has been found against appellants.

From the entire course of dealing appellants had (when they received the last two cars) reason to believe that drafts, discounted by appellee, had been drawn against these shipments, and Mr. Hoag of their firm testifies that he thinks they knew that Harrison had made a draft against them.

The precise hour at which the letter written by Harrison December 26th, in which he stated that he had drawn on them for \$1,337 and had started the stock to get in by the time the "stock" did, was received, is not shown, but appellants do not testify that when they received these consignments they had no notice that any draft had been made against them. The expression in this letter, "Had started the stock to get in by the time the stock did," they can not have failed, and do not claim to have understood as meaning otherwise than "had started the stock to get in by the time the draft did." A consignor may always direct as to the disposition of the net proceeds of a consignment. If appellants did not care to obey the directions of Harrison as to the disposition of the proceeds of the cattle, they should have declined to receive them; if, having notice that Harrison had made a draft against the proceeds of the shipments, they saw fit to receive and sell the cattle, then they became bound to apply the proceeds to the payment of the draft. That they had such notice the

Circuit Court has found and we think the evidence warranted its conclusion.

The question is not so much whether the bank discounted the drafts on the faith of the shipments, as whether Harrison, the consignor, by the drafts appropriated the proceeds of the shipments to their payment, and whether appellants had notice when they received the stock of such appropriation. If appellants were notified by Harrison when they received the shipments that drafts in favor of a third person were to be paid out of the proceeds of the stock, then such notification in connection with the drafts amounted to an appropriation of the proceeds to the payment of such drafts. Jones on Liens, Sec. 61.

We see no sufficient reason for interfering with the finding of the court below and its judgment must be affirmed.

Judgment affirmed.

BERMAN FRIEND

V.

EMMA ENGEL ET AL.

Judgments and Decrees—Interest—Practice.

1. A higher rate of interest than six per cent can only be stipulated for in written contracts.

2. The words of a decree must be read and understood in the light of the law.

3. Where a decree provides that the rate of interest agreed to be paid by a person deceased shall be allowed, no legal or valid agreement being shown for more than six per cent, only that rate can be charged.

[Opinion filed December 7, 1891.]

APPEAL from the Circuit Court of Cook County; the Hon. LOREN C. COLLINS, Judge, presiding.

Messrs. KRAUS, MAYER & STEIN, for appellant.

Messrs. JOHN O. RICHBERG and GABRIEL J. NORDEN, for appellees.

MORAN, J. By a decree entered in this case settling the rights of the parties, the court found that appellant held in trust for appellees the title to a certain lot in Chicago, subject to a first lien in favor of appellant for \$3,150, with interest after September 30, 1876.

The said decree provided that a master should ascertain the amount, and directed that "rate of interest to be allowed him (appellant) is to be such as was agreed to be paid by him, said Julius Jackson, in his lifetime." Julius Jackson was the father of appellees and they claimed through him.

Appellant testified before the master that the last rate of interest agreed upon between him and said Julius Jackson was eight per cent.

The master, following the direction of the decree as he interpreted it, allowed interest on the amount of the loan as fixed by the court at the rate of eight per cent per annum from the date of the last payment of interest in October, 1884. An exception to the master's report for the allowance of said interest was taken, which was sustained by the court, and the interest reduced to six per cent for the period.

This is the error complained of, and it is contended that the court was bound, in stating the account, by its former decree, and that the interest as verbally agreed upon at the rate of eight per cent should have been allowed.

A higher rate of interest than six per cent can only be stipulated for in written contracts. *Edler v. Uchtman*, 10 Ill. App. 488.

The court's decree that the rate of interest agreed to be paid should be allowed, must be interpreted to mean such rate as was agreed upon in a lawful manner; such agreement as was binding in law.

Leaving out of view the question made as to the incompetency of appellant as a witness, the evidence did not show a legal or valid agreement for eight per cent interest, and therefore neither under the decree nor the law was appellant

entitled to it, for the words of the decree must be read and understood in the light of the law.

The court was right in sustaining the exception to the master's report and allowing interest at only six per cent. The decree will be affirmed.

Decree affirmed.

THE COUNTY OF COOK

V.

DANIEL J. WREN, FOR USE, ETC.

*Municipal Corporations—Officers—County Commissioners—Salary of—
Sec. 10, Art. 10, Constitution—Sec. 39, Chap. 34, R. S.—Set-off.*

1. A person taking the office of county commissioner is bound to know the location of the institutions under the control of the county board, and that the management of them will involve personal inspection thereof by it. Where the compensation of such officers is fixed by law at so much each per day, such sum covers all duties, whether their performance involves personal expense in traveling or not.

2. In such case a commissioner can recover for his services only the sum resulting from multiplying the number of days of service by such sum.

3. Where the estimate for the annual appropriation contains an amount for "miscellaneous expenses," such expenses must be looked upon to mean expenses of the county, not personal expenses of the commissioners.

4. If conveyances become necessary for the transportation of the county board, or its committees, in the discharge of board functions, they constitute board or county expenses, and are not incurred by individual commissioners, nor are they to be paid to them.

5. One who deals with agents of a municipal corporation is bound to know their authority, and if he receives from them money which they have no legal authority to pay, it may be recovered in an action by the municipality.

6. A county may recover any excess of compensation paid a county commissioner over and above what was legally due him, and the same is a proper matter of set-off in an action brought to recover on a warrant issued to such person in payment of his *per diem* as commissioner.

[Opinion filed December 7, 1891.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

County of Cook v. Wren.

Messrs. FRANCIS W. WALKER and EDWARD J. JUDD, for appellant.

Sec. 10 of Art. 10 of the Constitution of 1870, provides that "The county board, except as provided in Sec. 9, shall fix the compensation of all county officers * * * provided that the compensation of no officer shall be increased or diminished during his term of office."

County Commissioners of Cook County are included in the term "county officers" used in the foregoing section of the constitution. *Wulff v. Aldrich*, 124 Ill. 591.

Sec. 39, Chap. 34, title "Counties," provides, that "The time of fixing the compensation of county officers whose compensation is to be fixed by the county board, shall be at the meeting of such board, next before the regular election of the officers whose compensation is to be fixed." The county board, in accordance with this statute, fixed the compensation of Wren before his term began, and any subsequent action of the county board in passing and allowing a greater sum than fixed by law, is *ultra vires*, and void. *Cumberland County v. Edwards*, 76 Ill. 544.

It was a physical impossibility for Wren to have earned the amount allowed him during the period for which it was allowed. If such allowance was thoughtless, it was a "mistake;" if it was intentional, it was a "fraud." In either case, it renders the allowance not binding on the county. *Albright v. County of Bedford*, 106 Pa. St. 582.

Money paid by mistake, or obtained by fraud, or, in case of a municipal corporation, if paid *ultra vires*, can be recovered back under the common count for money had and received for the use of the plaintiff. *Demarest v. Township of New Barbadoes*, 40 N. J. 604; *Board Com. Marshall Co. v. Johnson*, 26 N. E. Rep. 821.

By the judge's refusal to allow the counsel of defendant to address the jury, defendant has been deprived of the right of trial by jury guaranteed it by both the United States Constitution and the Constitution of this State.

By the court's directing a verdict, the defendant has likewise been deprived of its rights to a trial by jury.

Messrs. HANEY & MERRICK, for appellee.

The law is well settled that where money has been voluntarily paid with full knowledge of all the facts and circumstances under which it was demanded, it can not be recovered back upon the ground that the party paying it labored under a misapprehension of his legal rights and obligations. 4 Wait's Actions & Defenses, 486, and cases there cited.

The plea of set-off admits the plaintiff's claim.

"Set-off has been well defined as a mode of defense by which the defendant acknowledges the justice of the plaintiff's demand, but sets up a demand of his own against the plaintiff to counterbalance it in whole or in part." Parsons on Contracts, Book 2, Sec. 10, page 873.

"The plea of set-off is an acknowledgment of the justice of the plaintiff's demand, and failing in the proof the judgment must be for the plaintiff's demand. 3 Blackstone's Com. 304 (Cooley's Ed.)." Raymond v. Kerker, 81 Ill. 381, 382.

"Under the count upon an account stated the original form or evidence of the debt is of no importance, for the stating of the account alters the nature of the debt, and is in the nature of a new promise or undertaking." Greenleaf on Evidence, 115; Throop v. Sherwood, 9 Ill. 92.

"An adjustment and settlement of accounts between parties affords evidence that all items properly chargeable at the time were included. This is not conclusive, but it would require clear and convincing proof that such items were unintentionally omitted by the party subsequently claiming to recover them." Bull v. Harris, 31 Ill. 487.

The above doctrine is approved in Strauber v. Mohler, 80 Ill. 21; Hodge v. Boynton, 16 Ill. App. 524.

The only evidence on the set-off was the testimony of Wren, and he repeatedly states the allowances were for *per diem*, mileage and expenses. This proves that defendant is not entitled to any set-off.

"Where a plaintiff receives, at the end of each month, a statement from the defendant of his account, and at the close of the dealings accepts a check of defendant as the payment

of the balance of the account, making at no time complaint of the accounts, or intimating any mistakes or incorrectness in the several statements, the acceptance of the check must be taken as an adjustment of the account between the parties." *Pyncheon v. Day*, 118 Ill. 9.

"Where a master has credited his servant for full time and settled on that basis, in an action on a note given to such servant he can not claim a set-off on the ground of time lost by the servant by reason of sickness." *Prussing Vinegar Company v. Meyer*, 26 Ill. App. 564.

There is no testimony in the entire record showing or tending to show the slightest fraud, circumvention, wrong dealing, mistake, or misapprehension at the time of the settlements between the parties.

"It is proper for the court to direct a verdict when it would be its duty to set aside a different one if rendered. An instruction may be given to return a verdict where there is no evidence having a tendency to prove the issue even under the 'rule of scintilla of evidence.'" *Thompson's Charging the Jury*, 44; 11 Am. & Eng. Encyclopedia of Law, 243, and cases there cited.

"If there is no evidence before the jury on a material issue, in favor of the party holding the affirmative of that issue, on which the jury can, in the eye of the law, reasonably find in his favor, the court may exclude the evidence or direct the jury to find against the party so holding the affirmative." *Frazer v. Howe*, 106 Ill. 563.

The above case is quoted with approval in *Simmons v. Chicago & Tomah R. R. Co.*, 110 Ill., on page 346 of the opinion, and in *Commercial Insurance Co. v. Scammon*, 123 Ill. 601.

In the latter case Mr. Justice Scholfield says: "The question of fact, when there is in the evidence a real controversy of fact, must be tried by the jury, but it is for the court to say whether evidence offered is pertinent to the issue, and also whether there is sufficient evidence before the jury to present an issue of fact under the pleadings, and if there shall not be, to direct what verdict shall be returned."

"This court will not reverse a judgment for an instruction to find for the plaintiff, when under the evidence the verdict could not have been different from what it was." *Caveny v. Weiller*, 90 Ill. 158; *Crowley v. Crowley*, 80 Ill. 469; *Hazen v. Pierson*, 83 Ill. 241.

Replying to the contention of appellant that it was denied the right of trial by jury, it is only necessary to say that the Constitution of the United States and of this State only guarantee a trial by jury to litigants upon controverted questions of fact in civil cases.

"The maxim is, "*Ad quæstionem facti non respondent iudices—ad quæstionem legis non respondent juratores.*" *Ross v. Irving*, 14 Ill. 171; *Mascall v. Commissioners of Drainage Districts*, 122 Ill. 620; *Commercial Ins. Co. v. Scammon*, 123 Ill. 601.

MORAN, J. An action was brought against the county of Cook in the name of Wren for the use of Henry E. Lowe, to recover on a warrant or county order issued to said Wren in payment of his *per diem* as county commissioner, for the quarter ending August 31, 1886. There was no contention on the part of the county that said warrant was not a valid claim for the compensation earned for the quarter for which it was issued, but an offset was interposed which was composed of alleged over-payment made to said Wren on orders on which he received the money prior in date to the one in suit. To prove this claimed set-off counsel for appellant offered five county warrants showing the payment to said Wren for five quarters, the first ending February 28, 1885, and the last ending February 28, 1889, of the aggregate sum of \$2,287. Appellant also introduced the records of the county board showing that on August 25, 1884, said board fixed the salaries of county officers for the years 1884 and 1885, among others, fifteen county commissioners, each at \$5 per day for actual service, and that on August 17, 1885, said board fixed the pay of the county commissioners for the year from September 1, 1885, to August 31, 1886, at \$5 per day for actual service. Appellant then offered to show by the almanac that during

the said five quarters, after deducting Sundays and legal holidays, there remained but three hundred and sixty days, and that said Wren's *per diem* could amount to no more than \$1,800, and that the excess of \$487 paid him as *per diem* during said period, the county was entitled to recover back and it was therefore a good set-off against the claim in suit. The court disregarded the said claim of set-off and directed the entry of a verdict against appellant for the amount of the warrant sued on, to wit, \$481.75, for which judgment was rendered. The principal question presented is, could said Wren retain money paid to him by the county as compensation for his services as commissioner, in excess of what he could possibly have earned, under the terms by which his compensation is fixed?

Sec. 10 of Art. 10 of the State Constitution requires that the county board shall fix the compensation of all county officers, and directs that the compensation of no officer shall be increased or diminished during his term of office. The compensation is to be determined at the meeting of the board next before the regular election of the officers whose compensation is to be fixed. Sec. 39, Chap. 34, R. S.

The records of the board introduced in evidence show that for the period covered by the warrants, the compensation of Wren was fixed at \$5 per day for actual service. Could he legally draw anything from the county over and above such fixed compensation for the performance of his duties as a county commissioner, even though in the performance of such duties personal expense was incurred, as for traveling expenses in visiting county institutions?

Dillon in his work on Municipal Corporations, Sec. 233, says: "It is a well settled rule that a person accepting a public office, with a fixed salary, is bound to perform the duties of the office for the salary. He can not legally claim additional compensation for the discharge of these duties even though the salary may be very inadequate remuneration for the services. The rule is important to the public. To allow changes and additions in the duties properly belonging, or which may properly be attached to an office to lay the foundation for

extra compensation, would introduce intolerable mischief. The rule, too, should be rigidly enforced. The statutes of the legislature, and the ordinances of our municipal corporations, seldom prescribe with much detail and particularity the duties annexed to public offices; and it requires but little ingenuity to run nice distinctions between what duties may, and what may not, be considered strictly official; and if these distinctions are much favored by courts of justice, it may lead to great abuse."

The law imposes on the county board the duty of erecting, maintaining and managing various county institutions, such as the poorhouse, insane asylum, etc., and one who takes the office of county commissioner is bound to know the location of these institutions, and that the management of them by the board of which he is a member will involve personal inspection of them by the commissioners, for the purpose of information, to the end that the action of the board may be intelligent and discreet. So far as the proper discharge of official duty in the management of county affairs and county institutions may require the commissioner to travel from one part of the county to another, or from his residence in one part of the county to a meeting of the board or a committee thereof in another part of the county, such acts, whatever the personal expense they entail, must be discharged without other recompense than is fixed by law for the performance of the duties of the office. He who takes the office takes it *cum onere*. He knows that the duties of it will require him to travel to different parts of the county and he agrees to assume those duties for a compensation of \$5 per day. In such case the number of days of actual service multiplied by five must show the amount of salary that he is legally entitled to receive for a given period of the term of office. This is so, for the reason that the county board in fixing the salary of county commissioners each year, determined that it should be so. Doubtless the board had the power to fix the salary at *per diem* for each day's service and such mileage or other expenses as the commissioner necessarily expended in the discharge of his duties, but the board did not do so, as appears by

County of Cook v. Wren.

the record. It fixed the salary of each commissioner "at \$5 per day for actual service." The compensation being thus fixed in such terms by the board, is the same in effect as if the legislature had itself fixed it by statute, for the board only exercises a power conferred upon it by the legislature. If it had been so fixed by statute it would be impossible to contend that mileage could be claimed in addition to the *per diem* named by the law as compensation for the personal discharge of the duties of the office. This exact point was decided by the Supreme Court of Pennsylvania in Albright v. The County of Bedford, 106 Pa. St. 582. There the statute provided that "the county commissioners of Bedford County shall receive out of the county treasury the sum of \$2 for each and every day necessarily employed by them, or either of them, in attending to the duties of their offices."

The contention by the commissioners was that they were entitled to demand from the county, expenses incurred by them in traveling around the county, in holding appeals in several townships and in visiting and examining county bridges. The claim included railroad fare, hire of conveyances, etc. The court in denying the claim said: "The unmistakable purpose" (of the law) "is to fix the entire compensation which the commissioners can draw from the county treasury. Not only shall they be paid by the day, but for the whole time they are necessarily employed in attending to the duties of their offices, they shall thus be paid. There is no provision for any other or different pay; no allowance for mileage, traveling expenses or boarding bills is prescribed. They derive their powers and authority as well as their compensation from the law. They can no more enlarge the one than the other. * * * These are matters for which the law does not provide and for which the county is not liable. When a positive law clearly prescribes the manner and nature of the compensation to be paid to a public officer, the directions of that law should be the only rule and measure of the officers' claim on the public moneys."

It appears from the records of the county board that in the estimate for the annual appropriation reported to the county board by the committee on finances, the *per diem* of commis-

sioners was placed at \$25,000 and "miscellaneous expenses \$25,000." No light is thrown on the question by the proof that such items were in the appropriation bill. Miscellaneous expenses must mean expenses of the county, not personal expenses of the commissioners.

Counsel for appellee argues that *per diem* is one thing and allowances for expenses another; and that the latter are to be determined by the county board from time to time as they might arise. It is true the necessary expenses for fuel, clerk hire, stationery, etc, for running any of the county offices or the business of the county board, are under the control of the board and may be provided for from time to time, but it can not be contended that such expenses are to be allowed to individual commissioners. No such expenses attend the performance of their personal official duties. It is said that appellee testified that part of the warrants in question were made up of allowances for mileage, and that the fact that the warrant was drawn for *per diem* would not prevent proof that it contained an allowance for mileage. It may be if the compensation was fixed by the board at a *per diem* and mileage, that it might be shown that a warrant calling for *per diem* also included mileage. But the difficulty is that there is no competent evidence that the county ever allowed any mileage. For the warrant to contain such an allowance in fact is one thing and for it to legally include such an allowance is quite another.

As is before said the *per diem* was the compensation fixed for the performance of the duties of the office by the commissioner. That covered all duties whether their performance involved personal expense in traveling or not. That compensation could not be increased during the term of office, directly by a larger *per diem* or indirectly by the allowance of mileage or other personal expenses. If conveyances become necessary for the transportation of the county board or its committees in the discharge of board functions, they constitute board or county expenses, and are not incurred by individual commissioners, nor are they to be paid to them.

It must be concluded, therefore, that the warrants which

were paid to said Wren exceeded the amount which the proof shows could be lawfully earned by him, and this is true even if *per diem* was to be allowed for every Sunday and legal holiday that occurred during the period covered by the warrants.

Could the excess of what could be earned be recovered back after having been paid, in an action by the county? On this question it is contended by appellee that the money was paid with full knowledge of all the facts and circumstances, and it can not therefore be recovered back. That would undoubtedly be the rule between natural persons in a case in which no fraud was perpetrated, and it may be that for any amount within the limit of what could possibly be legally earned, the settlement and payment of an account between a public corporation and an individual would be held *prima facie* binding and to be opened only on proof of fraud or mistake. But that rule could operate as against a municipal corporation, only where the money paid was within the limit of the amount authorized to be paid by law in any event, and could not be extended to cases where the amount sought to be recovered back was paid in excess of the amount which could in any event be legally found due.

An officer whose salary was fixed by a *per diem* for actual service, could not retain against the municipality, the amount of the *per diem* for four hundred days' service in any one year, on the plea that it had been paid to him by an agent of the corporation upon knowledge of all the facts.

No agent would have authority to bind the county by such a payment, or to estop it to recover back money so paid without authority of law. One who deals with agents of a municipal corporation is bound to know their authority, and if he receives from them money which they have no legal authority to pay, it may be recovered back in an action by the municipality. *Demarest v. Inhabitants of New Barbadoes*, 40 N. J. L. 604; *Board of Commissioners of Marshall County v. Johnson*, 26 N. E. Rep. 821.

In *Ellis v. Ward*, 20 N. E. Rep. 671, it is held by our Supreme Court that a fund of a private corporation paid by

the directors to its president as salary when there was no by-law authorizing payment for such services could be recovered back by the corporation or its receiver.

We hold, therefore, that the county could recover back any excess of compensation over and above what could legally be due to appellee which the evidence showed had been paid to appellee, and that the same was a proper matter of set-off against the claim on the warrant on which suit was brought. It follows that the court erred in disregarding the claim for the excess of payment and directing the jury to find a verdict for the plaintiff for the amount claimed by him.

There were certain irregularities as to the entering of the verdict in this case. In fact, as the bill of exceptions shows no verdict was ever rendered by the jury, the error in that regard need not be discussed, as it is very unlikely that it will occur again.

Judgment reversed and case remanded.

WILLIAM DOUGLAS SLOANE

V.

RINNAH A. WELLS.

Sales—Real Estate—Cancellation of Contract.

1. Where a vendor files a bill to cancel a contract to purchase certain real estate, by the terms of which contract payment was to be made after an abstract of title had been furnished and found satisfactory, it is not sufficient to allege that vendee did not find the abstract furnished satisfactory, and that he, the vendor, has tendered a warranty deed and the earnest money, which has been declined.

2. It does not, in the case presented, from such allegation appear that the vendee ought to have been satisfied with the abstract, or that, in tendering a warranty deed, there was tendered a good and sufficient title.

[Opinion filed December 7, 1891.]

APPEAL from the Circuit Court of Cook County; the Hon. O. H. HORTON, Judge, presiding.

Appellant made a written contract of sale to appellee of certain real property. One thousand dollars was paid down; payment of the balance was to be made in thirty days after an abstract of title made by a reputable abstract maker had been furnished and found satisfactory, and upon the delivery of a good and sufficient warranty deed. Appellee was not satisfied with the abstract furnished and so notified appellant. Appellant thereupon tendered a warranty deed; this being declined, he tendered back the \$1,000 and demanded a surrender of the contract; this being refused, he filed his bill to cancel the contract, it having been placed on record.

Messrs. C. H. REMY and J. B. MANN, for appellant.

Mr. MATTHEW P. BRADY, for appellee.

WATERMAN, P. J. The bill filed in this case alleges that the abstract was not found satisfactory by appellee; it does not charge that the abstract was such an one as ought to have been regarded as satisfactory; nor does it set forth what the abstract contained, so that the court could determine whether it was one with which appellee ought to have been satisfied. Nor is there any showing that it is not within the power of appellant to furnish a satisfactory abstract. Nor is there any showing that, in tendering a warranty deed, there was tendered a good and sufficient title.

A general consideration of the rights of vendors under contracts for the sale of real property will be found in *Derickson v. Chicago South Branch Dock Co.*, 18 Ill. App. 531. The case of *Hale v. Cravener*, 128 Ill. 408, is decisive of this, and the decree of the court below dismissing the bill for want of equity is affirmed.

Decree affirmed.

THE RHOADES & RAMSEY COMPANY

V.

PETER SMITH AND HANNAH SMITH.

Creditors' Bills—Fraudulent Sale—Evidence.

1. The purchaser of property alleged to have been sold in fraud of the creditors of the grantor may be interrogated, he being charged with knowledge of such fraudulent intention, as to his financial condition and ability, in proceedings instituted by such creditors to set aside the same.

2. If such purchaser paid for the property, he can not be deprived of it, unless he took it with knowledge of the grantor's fraudulent intent, or with knowledge of such facts and circumstances as would put him on notice that such grantor was conveying the property for the purpose of hindering, delaying or defrauding his creditors.

[Opinion filed December 7, 1891.]

APPEAL from the Circuit Court of Cook County; the Hon. LOREN C. COLLINS, Judge, presiding.

Messrs. BURKE, HOLLETT & TINSMAN, for appellant.

Messrs. HANEY & MERRICK, for appellees.

MORAN, J. Appellants filed their creditor's bill against James Riley and James McDowell and the appellees alleging the recovery of judgment in favor of appellants for something over \$4,000, against said Riley and McDowell, on an indebtedness owing from said Riley and McDowell to appellants, and the return of an execution *nulla bona*. The bill alleges among other things that after said indebtedness from Riley and McDowell to appellants and before commencement of the action in which judgment was rendered, said defendant, Riley, conveyed to one Peter Smith by warranty deed a certain lot in the bill described for the alleged consideration of \$2,500; that said Riley was at the time of said conveyance the owner of the said lot, with the house thereon, and that the

conveyance to said Smith was a colorable transaction and made for the purpose of hindering and delaying appellants in the collection of their said debt; that said consideration was not paid by said Smith, or if paid was not paid in good faith, and that said Smith did not receive said conveyance for any debt justly due him from said Riley, but by arrangement with said Riley said property was so transferred by said Riley in order to keep the same from his creditors, and that at the time of the conveyance by said Riley he was insolvent and indebted to appellants; that the said property so conveyed was worth about \$5,000. The bill prays that said conveyance should be set aside and declared fraudulent against appellants, and said premises sold and the proceeds applied toward the payment of said judgment.

On the hearing, it appeared by uncontradicted testimony that Riley, just before he executed the deed to Smith, stated that he wanted to make over his property to said Smith, so that he would get out of paying his debt to appellant; that at the time said deed was drawn and signed and acknowledged by said Riley, said Smith was not present; that Smith was at the time said deed was made, the brother-in-law of said Riley; that Riley continued for more than a year after the making of the deed, to rent the premises and collect the rent therefor in his own name, and that he also continued to pay the taxes on the lot.

All these circumstances certainly made a case justifying the inference that the transfer was fraudulent and without consideration. It was clearly shown to be fraudulent on the part of Riley, and if Smith did not pay a consideration for the deed he could not hold the property against a creditor of Riley. When Smith was called to the stand he showed that he lived in a house which he had purchased for \$1,700. He was asked if that house was paid for, but that question his counsel objected to and the court sustained the objection. The question was proper and should have been allowed. It was competent for appellants to inquire into Smith's financial condition and ability. There was no attempt to show by Smith that he in fact paid for the lot conveyed to him by Riley.

His counsel contented himself with asking him if he had money to pay for this building when he bought it. On the close of complainant's evidence the court dismissed the bill as to Smith and wife for want of equity. This was error. The facts proved by complainant required a decree against Smith unless he showed that he actually paid for the property. If he did actually pay for the property he could not be deprived of it unless he took it with knowledge of Riley's fraudulent intent, or with knowledge of such facts and circumstances as would put him on notice that Riley was conveying the property for the purpose of hindering, delaying or defrauding his creditors.

The decree dismissing the bill must be reversed and the case remanded to the Circuit Court, with directions to deny the appellee's motion to dismiss the bill as to them, and to proceed with the case in a manner not inconsistent with this opinion.

Reversed and remanded.

JENNIE A. GRANT, EXECUTRIX,

V.

MARY E. ODIORNE.

Administration—Claim for Money Withheld by Deceased—Agency—Fraud—Judgments by Confession.

1. Upon the presentation of a claim against an estate covering moneys alleged to have been due complainant from deceased, his financial agent, it is enough to prove that funds of the former came into the hands of the latter; the estate must show what became of them. The complainant is not required to show by a preponderance of the evidence that neither he nor any other person had received from such agent or another the amount for which claim is made.

2. Where such funds are in the hands of such agent under an express trust, he holding them, not as a collecting but as an investing agent, the statute of limitations will not begin to run as to them until demand is made therefor, or he places himself in a position of hostility to his principal.

3. In the case presented, this court holds that the evidence tended to show a fraudulent concealment, and the fact being that the fraud was not

Grant v. Odiorne.

discovered until after the death of the agent, that the statute began to run only from its discovery.

4. The statute does not run where funds are intrusted to another to invest, and the evidence does not show that he ever refused to act as an investing agent, nor any demand upon him to pay over anything more than the interest he had collected.

[Opinion filed December 7, 1891.]

APPEAL from the Circuit Court of Cook County; the Hon. GEORGE DRIGGS, Judge, presiding.

William C. Grant in his lifetime received, loaned and collected certain moneys for one Thomas Odiorne. Odiorne lived in Massachusetts and transacted his business with Grant by way of correspondence. Thomas Odiorne died in 1873, his estate being administered by his brother, William H. Odiorne. The interest of Thomas Odiorne having passed to his daughters, they continued as their father and uncle had, to correspond with Mr. Grant concerning the loans under his charge. Mr. Grant died in 1887, and his estate, upon request, turned over to Miss Odiorne certain securities, but not the amount which she had come to believe were in his hands belonging to her. She therefore filed her claim in the Probate Court and obtained an allowance against his estate, from which his executrix took an appeal; the case being retried in the Circuit Court, the executrix of the Grant estate has appealed to this court from the judgment there rendered.

Messrs. LEROY D. THOMAN and LOUIS M. GRANT, for appellant.

The statute of limitations will prevent the claimant from recovering upon any of the disputed items in this cause, for the reason that Mr. Grant did not receive and hold the money under an express and continuing trust. Angell on Limitations, Secs. 166-178; Lyon v. Marclay, 1 Watts (Pa.), 275; White v. White, 1 Md. Ch. 53; Murray v. Coster, 20 Johnston (N. Y.), 576; Finney v. Cochran, 1 Watts. & Serg. (Pa.) 112; Quayle v. Guild, 91 Ill. 378; Cagwin v. Ball, 2 Ill. App. 70; Hayward v. Gunn, 82 Ill. 385; Kane v. Bloodgood, 7 Johnson (N. Y.), 89, 113, 114.

Money in the hands of a collecting agent or attorney constitutes only a resulting or constructive trust, against which the statute of limitations will begin to run from the date the said funds were so placed in his possession, or came under his control. *Lillie v. Hoyt*, 5 Hill (N. Y.), 396; *University v. Smith*, 32 Wis. 587; *Hayward v. Gunn*, *supra*; *Finney v. Cochran*, *supra*; *Glenn v. Cuttle*, 2 Grant's Cases, 273; *Fleming v. Culvert*, 46 Pa. 498; *Douglas v. Corry*, 46 O. S. 349; *Hart's Appeal*, 32 Conn. 520; *Simms v. Breton*, 3 Exch. 802; *Baker v. Joseph*, 16 Cal. 173; *Wood's Limitations*, 286, 418; *Story's Eq. Juris.*, Sec. 962.

There was no fraudulent concealment of the cause of action. *Wood v. Carpenter*, 101 U. S. 135; *Burke v. Smith*, 16 Wall. 401; *Evans v. Bacon*, 99 Mass. 213; *Bartalott v. Bartalott*, 11 Ill. App. 620; *Nudd v. Hamblin*, 8 Allen, 132; *Martin v. Smith*, 1 Dill. 85; *Stone v. Brown*, 18 North E. Rep. 392; *Canada v. Green*, 3 Myl. & K. 722; *Cole v. McGlathy*, 9 Me. 131; *Farnum v. Brooks*, 9 Pick. 212; *McKowan v. Whitmore*, 31 Me. 443; *Rouse v. Southard*, 39 Me. 401; *Boyd v. Boyd*, 27 Ind. 429; *Stanley v. Stanton*, 36 Ind. 445; *Wynne v. Cornelison*, 52 Ind. 312; *Conner v. Goodman*, 104 Ill. 365; *Beatty v. Nickerson*, 73 Ill. 605; *Angell on Limitations*, Sec. 187; *Statutes of Illinois*, 1874, Sec. 22.

The claimant is barred by *laches*. *School Directors v. School Directors*, 16 Ill. App. 651; *Bartalott v. International Bank*, 14 Ill. App. 158; *Wachter v. Albee*, 80 Ill. 47; *Canada v. Green*, *supra*; *Campbell v. Boggs*, 48 Pa. 524; *Blinn v. Beman*, 66 Pa. 185; *Martin v. Smith*, 1 Dillon, 85; *Moore v. Green*, 19 How. 69; *Bonney v. Stoughton*, 122 Ill. 536; *Rhines v. Evans*, 66 Pa. 192; *Mariot v. Hampton*, 2 Smith's Leading Cases, 400; *Milne v. Duncan*, 6 B. & C. 671; *Kelly v. Salari*, 9 M. & W. 54; 3 Blackstone Com., 196; 4 Coke, 11 b; *Chitty on Contracts*, 10 Am. Ed., 694.

Messrs. BALL, WOOD & OAKLEY, for appellee.

The so-called Laroque claim is an express trust to which the statute of limitations has no application. *Donlin v. Bradley*, 119 Ill. 412; *Jones v. Lloyd*, 117 Ill. 597; *Michoud v.*

Grant v. Odiorne.

Girod, 4 How. 506; Bacon v. Rives, 106 U. S. 99; Brickener v. Lightner's Ex'rs, 40 Pa. 199; Albretch v. Wolf, 58 Ill. 186.

Upon Johnston's claim and as applicable to all the claims we cite Vigus v. O'Bannon, 118 Ill. 334; Fish v. Cleland, 33 Ill. 238; Greenman v. Greenman, 107 Ill. 404; McDowell v. Potter, 8 Pa. St. 190; Seymour v. Freer, 8 Wall. 202; Hubbard v. U. S. Mtge. Co., 14 Ill. App. 40.

Grant occupied a position of trust and confidence in which he was bound to honestly care for and truly report about the moneys placed in his hands; and having appropriated these moneys and made false statements in regard to them, he can not set up *laches* upon the part of his principals in bar of the present action. No time runs against a fraud. Michoud v. Girod, 4 How. (U. S.) 506; Brickener v. Lightner's Exrs., 40 Pa. 199; Albretch v. Wolf, 58 Ill. 186; Kent, C. J., in Sands v. Codwise, 4 John. 599; 1 Story's Eq. Jur., Sec. 323; Jones v. Lloyd, 117 Ill. 597; Vigus v. O'Bannon, 118 Ill. 334; Greenman v. Greenman, 107 Ill. 404; Fisher v. Tuller, 23 N. E. Rep. 523 (Indiana).

Upon the Hagarty loan, and generally, we cite Vigus v. O'Bannon, *supra*; Michoud v. Girod, *supra*; Bacon v. Rives, *supra*; Hardwicke v. Vernon, 14 Vesey, 505; Fisher v. Tuller, 23 N. E. Rep. 523 (Indiana.)

The possession of the agent is not adverse to the principal, and as between them there is no limitation of time, unless there be a clear repudiation of the agency brought home to the knowledge of the principal, so as to require him to act as upon an asserted adverse title. And the burden of proving such hostile attitude is upon the agent. 2 Evans' Pothiers on Contracts, 126; O'Halloran v. Fitzgerald, 71 Ill. 53; Fox v. Cash, 11 Pa. St. 207; Sims v. Smith, 11 Ga. 195; Merrian v. Hassam, 14 Allen, 522; Baker v. Whiting, 3 Sumner, 466; Kane v. Bloodgood, 7 John. Ch. 90; Harrisburg Bank v. Foster, 8 Watts, 12; Baker v. Dobyns, 4 Dana (Ky.), 226; Seymour v. Freer, 8 Wallace, 202; Hubbard v. U. S. Mortgage Co., 14 Ill. App. 40; Hardwicke v. Vernon, 14 Vesey, 505; Fisher v. Tuller, 23 N. E. Rep. 523 (Ind.); 1 Story's Eq. Jur., Sec. 323; Jones v. Lloyd, 117 Ill. 597.

The statute of limitations does not begin to run in cases like the present one until after explicit demand is made by the principal, or the agent has unequivocally placed himself, to the full knowledge of the principal, in a hostile attitude. This is the rule both at law and in equity. *First Mass. T. C. v. Field*, 3 Mass. 201; *Henry Co. v. Winnebago Company*, 52 Ill. 299; *Kelly v. Donlin*, 70 Ill. 378; *Findley v. Stewart*, 46 Iowa, 654; *Kilbourne v. Sutherland*, 130 U. S. 505, 518; *Sherwood v. Sutton*, 5 Mason, 143; *Persons v. Jones*, 12 Geo. 371; *Albretch v. Wolf*, 58 Ill. 186; *Cowper v. Godmond*, 9 Bing. 748; *O'Halloran v. Fitzgerald*, 71 Ill. 53; *Sands v. Codwise*, 4 John. 599; *Zeller's Lessee v. Eckert*, 4 How. 295; *Whitehead v. Lord*, 11 English L. & Eq. 587; *Moffat v. Buchanan*, 11 Humph. 369.

The statute of limitations would not commence to run until the claimant actually discovered the fraud and indirection practiced upon her by Mr. Grant. The claim filed in this cause, and from which the estate has appealed, shows that the claimant did not discover such fraud until after the death of Mr. Grant. The burden of showing when the fraud was discovered by her is upon the estate. The court will not assume such a discovery in order to start the running of the statute. Undue concealment of necessary facts by one occupying a relation of confidence is such fraud as will prevent the running of the statute. *McDowell v. Potter*, 8 Pa. St. 189; *Kilbourn v. Sutherland*, 130 U. S. 505, 518; *Bacon v. Rives*, 106 U. S. 99; *Kane v. Bloodgood*, 7 John. Ch. 122; *Walden v. Karr*, 88 Ill. 49; *Greenman v. Greenman*, 107 Ill. 404; *Albretch v. Wolf*, 58 Ill. 186; *Fish v. Cleland*, 33 Ill. 238; *Findley v. Stewart*, 46 Iowa, 355.

Grant's estate is liable to the claimant for all sums for which Grant would have been liable were he still living and this action was against him. *Gillett v. Hickling*, 16 Ill. App. 392; *Lewin on Trusts*, 901; *Farrelly v. Ladd*, 12 Allen, 127; *Doyle v. Murphy*, 22 Ill. 502; *Allen v. Russell*, 78 Ky. 105, 112; *Perry on Trusts*, Sec. 38; *Bishop v. Knight*, 1 P. Wms. 406.

Upon all moneys of the claimant that the court finds Grant converted to his own use, interest should be computed at six

Grant v. Odiorne.

per cent with annual rests. 2 Story Eq. Jur., Sec. 1277; Hardwicke v. Vernon, 14 Vesey, 505; Ogden v. Larrabee, 57 Ill. 389; Asay v. Allen, 124 Ill. 391.

WATERMAN, P. J. It would serve no useful purpose to enter upon a review of the evidence in this case. It is sufficient to say that not only have two tribunals found that Grant withheld from the claimant and those under whom she claims moneys and information which belonged to them, but that in the opinion of this court the evidence justifies such conclusion.

The principal contentions of appellant are that, before the claimant can recover, she must show by a preponderance of the evidence that neither she nor any other person justly entitled thereto has received from Mr. Grant or any other person the several amounts for which judgment is asked; and that the said Grant, as to all moneys received by him from persons to whom he had loaned the same, or on account of the sale of securities, was a mere collecting agent, and that there has been as to such funds inexcusable *laches*; that the statute of limitations began to run as soon as these funds were secured, and its bar is now complete.

As to the first proposition, we need only say that it was sufficient for the claimant to show that money belonging to her came into the hands of Grant; it was then for the estate to show what had become of it. The presumption of good faith upon his part is not sufficient to overcome the presumption that a state of affairs once existing is presumed to have continued. To the defense of *laches* interposed, insisting upon the statute of limitations, the reply is made, first, that as to a portion of the funds in the hands of Grant there was an express trust; that he did not hold or receive the funds as a mere collecting but rather as an investing agent, and that consequently the statute would not begin to run until demand was made upon him or he placed himself in a position of hostility to his principal.

Second, that there was upon his part a fraudulent concealment of the facts, and that the real condition of affairs, or

rather the fraud practiced by him, was not discovered until after his death, and only from its discovery did the statute begin to run. As to these replies, in so far as they depend upon questions of fact, the finding of the court below was against the appellant; and we see no sufficient reason for interfering with its conclusion. That there was evidence tending to show a fraudulent concealment upon his part can not be disputed, and that the statute of limitations does not begin to run until notice of the fraud is had, is too well established to require the citation of authorities.

If the Odiornes were not as suspicious as they might have been concerning the "La Rocque" loan and the "item of \$1,358.86," and consequently did not search the records, and sooner discover the fraud practiced upon them, it must be borne in mind that they were relying upon a trusted attorney and agent, and that he abused their confidence. The case of *Vigus v. O'Bannon*, 118 Ill. 334, is instructive upon this point.

The funds were originally intrusted to Mr. Grant to invest. The desire of his principal to keep the money loaned, and to receive only the interest thereon, was apparent, and there is an utter failure to show either that he ever declined longer to act as an investing agent, or any demand upon him to pay over anything more than the interest he had collected.

In such case the statute does not run at law, and in a court of equity there can not be said to be *laches*. *Albretch v. Wolf*, 58 Ill. 186; *Hubbard v. U. S. Mortgage Co.*, 14 Ill. App. 40; *Seymour v. Freer*, 8 Wall. 202; *McDonell v. Potter*, 8 Pa. State, 189.

As to these funds, so far as his principals knew, Grant never occupied a position hostile to their interests. He gave them to understand that his possession and custody of these funds was theirs.

It is urged that evidence as to the Johnston and Haggerty loans was improperly admitted because a confession of judgment had been made upon those claims. The offer to confess judgment was not for as large amount as appellee insisted was due upon those matters, and consequently whatever went to show the sum actually due thereon was admissible. It is also

urged that a judgment by confession for \$2,305, should have been deducted from the amount found to be due by the court, and judgment entered only for the balance. The judgment in this cause was entered on the 10th day of January, 1891, and a record of the cause, including a bill of exceptions, was made and certified by the clerk of the Circuit Court to be "true, perfect and complete," March 3, 1891. By certificates of the clerk of the Circuit Court, made March 31, 1891, it appears that the estate of William C. Grant, by order of court made March 24, 1891, filed *nunc pro tunc* as of July 8, 1890, a confession of judgment on the "so called" Johnston and Haggerty loan for \$2,305, and that on the 28th of March, 1891, judgment *nunc pro tunc* as of July 8, 1890, was entered upon such confession for \$2,305. The term of the Circuit Court at which the judgment for \$10,724.35, now under consideration, was rendered, expired January 17, 1891; thereafter the court could not change or vary that judgment. The judgment of the December, 1890, term can not be invalidated by a confession made by appellant and judgment at its instance entered at the ensuing March term, although the order declares it to be *nunc pro tunc* as of July 8, 1890. Not only had the December term, 1890, at which the judgment in this cause was entered, passed, but appellant had been allowed an appeal therefrom, and had perfected the same, February 9, 1891, nearly fifty days prior to the entry of the *nunc pro tunc* judgment of March 28th.

From some remarks of counsel appearing on the bill of exceptions, it would appear that counsel for appellant had during the trial of the cause stated that he would confess judgment on the Johnston and Haggerty loans, but no confession was made or judgment thereon entered until March, 1891. It does not appear that appellee is endeavoring to enforce both judgments; if that entered March 28, 1891, is for a portion of the same cause for which the judgment of January 10, 1891, was rendered, appellant should apply to the proper tribunal, and in the proper manner, for relief from the consequences of her own acts.

Upon the consideration of the whole record we are satisfied

with the finding and judgment of the court below, and it is affirmed.

Judgment affirmed.

A. S. BERKOWSKY AND DANIEL SABLE

V.

FRANK SABLE.

43 410
50 232

Mechanic's Liens—Secs. 29, 30 and 37—Employe of Sub-contractor.

1. Sec. 29 of the Mechanics' Lien Act does not extend the right to a lien to an employe, or sub-contractor of a sub-contractor.

2. A party's rights must be governed by the law in force when his cause of action accrued.

3. One who has no right to a lien can not maintain an action at law to obtain a personal judgment under the terms of Sec. 37 of the Mechanics' Lien Act.

[Opinion filed December 7, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding.

Mr. M. D. BROWN, for appellant Berkowski.

Mr. CHARLES WERNO, for appellee.

MORAN, J. Appellee, who was the employe of a sub-contractor, brought this action against the owner and said sub-contractor to recover wages due him for labor on a certain building being erected by said owner. Appellee served on the said owner the notice required by Sec. 30 of the Mechanics' Lien Act. The case was appealed from a justice to the Superior Court, and on a trial in said court a judgment was rendered against appellants and in favor of appellee for \$62. This was clearly erroneous. Sec. 29 of the Mechanics' Lien Act does not extend the right to a lien, to an employe or sub-contractor

Doran v. Hodson.

of a sub-contractor. This has been repeatedly determined by the Supreme Court. *Rothgerber v. Dupuy*, 64 Ill. 452; *Ahern v. Evans*, 66 Ill. 125; *Newhall v. Kastens*, 70 Ill. 156; *The Smith Bridge Co. v. The L. N. A. & St. L. Ry. Co.*, 72 Ill. 506.

One who has no right to a lien can not maintain an action at law to obtain a personal judgment under the terms of Sec. 37 of the Lien Act.

In construing the law the Supreme Court in *Rothgerber v. Dupuy*, gave as one of the reasons why Sec. 29 did not give a lien to an employe of a sub-contractor, that the section did not give the owner the power to compel a sub-contractor to give him an account of the number of persons in his employ with the rate of wages, etc., as it did the contractor.

Counsel for appellee contends that said section is now to have a different construction, because the law as it now stands compels the sub-contractor to furnish to the contractor a statement of the persons in his employ. We are not called upon by this contention to consider what, if any, effect the amendments to the lien act have on the rights of employes of sub-contractors.

The work for which appellee claims to recover was done in the summer of 1890, and this action was commenced before the justice in September, 1890.

The amendment to the lien law requiring sub-contractors to furnish a statement went in force July 1, 1891. Appellee's rights must be governed by the law in force when his cause of action accrued.

The judgment is erroneous and must be reversed.

Judgment reversed.

M. DORAN AND E. R. SMITH

v.

JOHN R. HODSON, ASSIGNEE.

Assignments—Duty of Assignee—Proceeds of Consignment to Person Subsequently Insolvent—Recovery of—Jurisdiction of County Court.

1. Ordinary diligence on the part of the assignee of an insolvent, requires that he should avail himself of sources of knowledge easily open to him, to learn upon what account money is paid to or required of him in his character of assignee.

2. If an assignee obtains *ex parte* orders of a County Court upon an assumed state of facts, which he knows, or ought to know, does not exist, he should not be protected by them against just claims.

3. It is within the jurisdiction of the County Court to hold the assignee to account for everything that comes to his hands by virtue of his position, and direct the disposition thereof, and require him to surrender to the rightful owner what in his hands are not assets of the estate, and having such jurisdiction, the rightful owner can not go to any other court for remedy.

4. Upon a petition to a County Court for an order on the assignee of an insolvent, to pay over the proceeds of certain goods sold by said insolvent previous to its assignment, this court holds that such proceeds were not assets of the estate, and that the court erred in not making the order prayed for.

[Opinion filed December 7, 1891.]

APPEAL from the County Court of Cook County; the Hon. FRANK SCALES, Judge, presiding.

MESSRS. ABNER SMITH and JAMES M. CLEAVER, for appellants.

MESSRS. BISBEE, KERN & REED, for appellee.

GARY, J. The appellee is assignee in insolvency of the P. McGurn Company, which had done a commission business in Chicago. The appellants sent a carload of bran to the company to be sold on commission, and the company sold it December 2, 1890, to LaFrance & Carstens. They gave to one Johnson, a salesman of the company, after the assignment, a check, \$128.28, for the bran.

The assignment was filed in the County Court December 12, 1890, but Johnson held the check for some time, owing probably to steps pending to remove the first assignee and appoint the appellee, and the check was not delivered to the appellee until January, 1891. He was not then informed, nor did he inquire on what account the money came, but the books of the company as well as inquiry of Johnson would have informed him if he had sought the information.

Ordinary diligence by the assignee of an insolvent would seem to require that he should avail himself of sources of knowledge easily open to him, to learn upon what account money is paid to or required of him in his character of assignee. The general doctrine as to notice of the rights or interests of others, is, that a party is treated as having knowledge of what he would have learned by inquiry, when the circumstances are such as to make it his duty and direct him where to inquire. The cases to that effect are so numerous in this State, and so easily found in the digests, that we need not cite any of them.

March 4, 1891, the appellants filed in the County Court a petition for an order on the appellee to pay the proceeds of the bran to them. It was admitted by the appellants that before the appellee had, in fact, notice of the claim of the appellants, he had, under the orders of the County Court, paid out, or incurred liability for, expenses that exceeded all the money in his hands as assignee.

Whatever may be the rule as to protection of an assignee by the *ex parte* orders of the County Court, if the assignee obtains such orders upon an assumed state of facts, which the assignee knows or ought to know is not true, he ought not to be protected by them against just claims. There is nothing in the record tending to show that the assignee gave the court any information about this check, or what funds he had or whence they were derived. The proceeds of the bran belonged to the appellants before, and when they came to the possession of the assignee were not assets of the estate; and the court should, as the case stands upon this record, have made the order prayed for. It is within the jurisdiction of the County Court to hold the assignee to account for everything that comes to his hands by virtue of his position, and direct the disposition thereof, and of necessity to require him to surrender to the rightful owner what thus in his hands is not assets of the estate. Because it has this jurisdiction, such rightful owner can not go to any other court for remedy. *Hanchett v. Waterbury*, 115 Ill. 220; *Field v. Ridgely*, 116 Ill. 424.

We will not give specific directions in remanding the case. Whether the company was entitled to any set-off, or upon what representations the County Court made the orders of which the appellee claims the benefit, the record does not show, and therefore the case is remanded only for further proceedings not inconsistent with this opinion.

Reversed and remanded.

THIRD SWEDISH METHODIST EPISCOPAL CHURCH
ET AL.
V.
O. D. WETHERELL, ASSIGNEE.

Insolvency—Set-off—Jurisdiction of County Courts.

1. A court of equity in cases of insolvency will regard the real parties in interest, and allow a set-off of demands in reality mutual.
2. All the original jurisdiction that belongs in ordinary cases to all courts, belongs to and may be exercised by the County Courts in administering the assets in the possession of an assignee of an insolvent.
3. At law the right of set-off has been greatly extended of late years in this State.
4. Upon a petition that an amount in an insolvent bank be set off against an indebtedness due thereto, this court holds, in view of the evidence, that the order denying the petition can not stand.

[Opinion filed December 7, 1891.]

APPEAL from the County Court of Cook County; the Hon. FRANK SCALES, Judge, presiding.

Messrs. BLANKE & CHYTRAUS, for appellants.

Mr. E. L. BARBER, for appellee.

GARY, J. April 4, 1890, M. T. Roberts was conducting a banking business in the name of M. T. Roberts & Co. as the Thirty-first Street Bank.

43	414
43	512
43	414
46	443
43	414
59	385

Third Swedish M. E. Church v. Wetherell.

He was applied to by the trustees of the church for a loan of \$2,000 for the church, to secure which they wished to give him a mortgage on the church, but he preferred a note of the individuals. They executed a note as follows:

“THIRTY-FIRST STREET BANK,
Cor. 31st Street and Michigan Ave.

\$575. CHICAGO, ILL., April 4, 1890.

On or before one year after date we jointly and severally promise to pay to the order of M. T. Roberts & Co., at their Thirty-first Street Bank, five hundred and seventy-five dollars for value received, with interest thereon at the rate of seven per cent per annum after due and until paid and \$100 additional as attorney's fees. Provided, however, that if this note is paid without suit or judgment no attorney's fees are to be paid.

(Here follows a power of attorney to confess judgment on said note.)

(Signed) B. SWENSON,
CHAS. F. PETERSON,
C. SKIRSTROM,
S. BURKMAN,
JOHN A. ENMARK,

Trustees of 3d S. M. E. Ch., Chicago.

(Endorsed.)

For value received we guarantee the payment of within note at maturity or any time thereafter, with interest at eight per cent per annum until paid, and agree to pay all costs or expenses paid or incurred in collecting the same:

(Signed) B. SWENSON,
CHAS. F. PETERSON,
C. SKIRSTROM,
S. BURKMAN,
J. A. ENMARK.”

Roberts told the trustees that they could reduce the note as fast as they collected from the church. Swenson, appellant with the church, was treasurer of it, and the money loaned was immediately put to his credit in the bank, in the same account with his own funds. Roberts failed with \$250.20

in his bank to the credit of Swenson, the odd twenty cents being Swenson's money, and the dollars being money of the church, and with \$575 unpaid upon the note. The appellee is the assignee of Roberts, administering his assets under the direction of the County Court.

The church and Swenson filed a petition that the \$250 be set off against the \$575, offering to pay the difference. From the refusal of the County Court to make the set-off this appeal is prosecuted. This state of facts shows that in good conscience the church is the ultimate and real debtor to the bank for the \$575 and creditor of the bank for the \$250, speaking for convenience of the bank instead of Roberts. That is, through Swenson, who must account to the church, the \$250 in the bank ought to come to the church, and through the trustees the \$575 they owe the bank, the church ought to pay. The fairness and justice then of one sum being applied to the reduction of the other are so apparent that they can not be made clearer. "A court of equity, in cases of insolvency, will regard the real parties in interest, and allow a set-off of demands in reality mutual." *Hughes v. Trahern*, 64 Ill. 48. And all the original jurisdiction that belongs in ordinary cases to all courts belongs to, and may be exercised by the County Courts in administering the assets in the possession of an assignee of an insolvent. See cases cited at bottom of page 217 in *Ide v. Sayer*, 30 Ill. App. 210.

Even at law the right of set-off has been greatly extended of late years in this State. See cases cited in *Graff v. Kahn*, 18 Ill. App. 485

The order of the County Court denying the set-off is reversed, and the case remanded to that court with directions to allow it.

Reversed and remanded.

City of Chicago v. Edson.

CITY OF CHICAGO
V.
WILLIAM N. EDSON.

43 417
73 151

Master and Serrant—Negligence of Master—Falling Window—Evidence—Instructions—Practice.

1. Error without injury is no ground for reversal.
2. An instruction trenching upon the province of the jury, either by direct or implied assumptions of fact, or by describing what particular acts constitute care, or its reverse, should not be given.
3. The presumption in a personal injury case is that the servant injured knew nothing of the dangers of the premises in which he was employed, in the absence of proof to the contrary.
4. A party is not ordinarily entitled to a new trial upon the ground of newly discovered evidence, unless he shows that the same is material and of a controlling and conclusive character.
5. It seems that upon a motion for a new trial, affidavits being filed, counter affidavits should not be received.
6. Where no objection is made to evidence when offered, an objection touching the same can not be considered upon appeal.
7. Under the allegation of expenses, proof of liabilities incurred is admissible.
8. Although the plaintiff in a personal injury case is working, when injured, for a given salary, in estimating his pecuniary loss, evidence of his capacity to earn more money in another employment for which he was fitted, is competent.

[Opinion filed December 7, 1891.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Messrs. JACOB J. KERN, City Attorney, and E. S. BOTTUM, for appellant.

Messrs. W. S. JOHNSON and H. H. MARTIN, for appellee.

GARY, J. This is an action for negligence by the appellee against the city, in which he recovered.

The city asked thirteen instructions, assigned twenty-six reasons for a new trial, and assigns twenty-one errors here. Such a mass of matter beclouds a case. *Harding v. Sandy*, 43 Ill. App. The appellee worked for the city as a fireman in the boiler room in the city hall, for \$60 per month. He was less than forty years of age, and had been a locomotive engineer for eleven years, at which employment he could earn much higher wages. He has suffered a great deal of pain, and is helpless for the remainder of, probably a very short residue of life. The jury assessed the damages at \$25,000; the court required a *remittitur* of \$9,000, and entered judgment for \$16,000. The damages for which judgment was entered can not be said to be excessive (*C. & E. I. R. R. Co. v. Holland*, 18 Ill. App. 418; *C. & A. R. R. Co. v. Fisher*, 38 Ill. App. 33); and if \$25,000 was too much, the *remittitur* removes the objection. *Village of Evanston v. Fitzgerald*, 37 Ill. App. 86.

In the boiler room were four windows. Through three of them, some time before the accident to the appellee, flues to the boilers had been put out and taken in, and it seems that the frames of those windows were thereby loosened and they were taken out altogether. Then from the 23d to the 27th of January, 1890, forty-four flues, weighing from eighty to one hundred pounds each, were put out and taken in through the other window.

That window was nine feet high, five feet seven inches wide, the bottom ten feet six inches from the floor, the frame of hard wood; the top and one side of the frame weighing about twenty pounds; and about three o'clock in the morning of January 29, 1890, they fell on the appellee while he was attending to his work. Nothing had been done to that window since the flues had been put through it. Even if *a priori* it could not be anticipated that putting, probably sliding, those flues over the window sill, would loosen the frame, experience with the other windows was notice of the probable result. Upon the instructions the only action of the court open to criticism was in giving this: "If those in charge of the building permitted the window in question to be used for a purpose which was unusual and was liable to loosen the frame

or to render it unsafe, then you are instructed that the law in that case required those having charge of the building to at once look after said window and see what condition it was in, and if they failed to do so and the window was in an unsafe condition and this caused the accident, and the plaintiff was at the time of the accident exercising ordinary care, then the defendant is liable."

Under the stringent rules established in this State as to the court trenching upon the province of the jury, either by direct or implied assumptions of fact, or by describing what particular acts constitute care or its reverse, this instruction is objectionable; first, in assuming that putting the flues through the window was unusual and liable to loosen the frame, or to render it unsafe; and second, if that use was so liable, then that the duty followed, whether such liability was known to the city employes or not, to at once look after the window. *I. C. R. R. Co. v. Zang*, 10 Ill. App. 594; *Lincoln Ice Co. v. Johnson*, 37 Ill. App. 453; *C. & N. W. Ry. v. Bouck*, 33 Ill. App. 123. Nor can the vices in the instruction be fairly said to be cured by the correct, general instructions given on the subjects of care, negligence and pure accident. Here was an instruction which described the particular facts, the facts themselves being beyond reasonable question established by the evidence, upon which the appellee was entitled to recover, leaving for the jury to consider only whether he was exercising care, and if so, the damages. But vicious as the instruction is, is it open to conjecture even that it did any harm? That the verdict would not have been the same, without as with it? That such use of the window was not using it as a window, was unusual, and was liable to loosen the frame and render it unsafe, is clear, and by previous experience with other windows, the city had notice of such liability.

The obligation to repair defects after notice is not in question; the defect was of the city's own creation, and the liability grows out of the creation of the defect, as in the case of a defect in original construction, and not merely out of neglect to repair. *C. & E. I. R. R. Co. v. Hines*, 33 Ill. App. 271; 132 Ill. 161; *Pfeifer v. Town of Lake*, 37 Ill. App. 367.

If, therefore, in the most careful hypothetical way, it had been left to the jury to say whether the city, with notice of the probable result, had done what made the window frame a peril to those working below, they must have found affirmatively. That error without harm is no cause for reversal has been often decided. *Carter v. Carter*, 37 Ill. App. 219.

The city moved for a new trial, partly upon newly discovered evidence. Two affidavits were filed, stating that the affiants, at about the time of the accident, were in the boiler room, were introduced by the assistant of the appellee, to him, and then while that assistant was out of the room, the appellee showed them in what condition of danger the window frame was. That the window had been in bad condition and repaired shortly before the flues were put through it, is in evidence. The affiants did not know the appellee, and could only say that they were introduced to a man of his name. He was cross-examined as to his knowledge of the condition of the window, and denied that he knew anything of it after it was repaired. The city tried on the trial to prove that, after the flues were put through, it was still safe. The presumption in the absence of proof to the contrary, is that he knew nothing of the danger. *C. & E. I. R. R. Co. v. Hines*, 132 Ill. 161.

If the testimony of these affiants were in the case, the verdict as it is could not be disturbed, because against it, and it is not, therefore, of that conclusive character that a new trial should be granted to let it in. *Schoenfeld v. Brown*, 78 Ill. 487; *Champion v. Ulmer*, 70 Ill. 322.

The court received counter affidavits. This practice seems to be disapproved by the Supreme Court. *Protection Life Insurance Co. v. Dill*, 91 Ill. 174; *Wray v. People*, 70 Ill. 664; *Mendell v. Kimball*, 85 Ill. 582. But see *Reed v. Curry*, 35 Ill. 536, and *Bowman v. Bowman*, 64 Ill. 75.

It is urged that the evidence as to the effect upon the frames of the three other windows, by putting flues through them, was wrongly admitted for want of proof of the similarity of condition of them and the window of which the frame fell on the appellee. The fact that there was nothing in the case hinting that all the windows in the one great room were

Granger v. Griffin.

not alike, was enough to warrant the presumption that they were not unlike. If there was any irregularity in admitting evidence of unpaid doctor's bills, and wages as locomotive engineer, such evidence only went to the amount of damages, and probably was not thought of in fixing them.

It is true as to the doctor's bills, that they were reasonable, was not proved, but counsel made no such point when the evidence was offered, and it is now too late. *Chicago, P. & St. L. Ry. Co. v. Nix*, 27 N. E. Rep. 81; *N. C. St. Ry. Co. v. Cotton*, No. 4062 this court.

Under the allegation of expenses, proof of liabilities incurred is admissible. *Richardson v. Chasen*, 10 A. D. & E. N. S. 756.

Although appellee was at the time of the accident at work for the city at \$60 per month, yet in estimating his pecuniary loss, evidence of his capacity to earn money in any other employment for which he was fitted was competent. 2 Thompson on Negligence, 1257.

On the whole case, it is clear that the appellee would always recover, and the judgment is affirmed.

Judgment affirmed.

RODNEY GRANGER

V.

JAMES F. GRIFFIN AND WALTER T. DWIGHT.

Agency—Commissions—Recovery of—Sale of Real Estate.

In an action brought by real estate brokers to recover a sum alleged to be due as commission, this court declines, in view of the evidence, to interfere with the judgment for the plaintiffs.

[Opinion filed December 7, 1891.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. BEACH & BEACH, for appellant.

Mr. G. W. STANFORD, for appellees.

GARY, J. The appellees sued the appellant in an assumpsit for commissions as real estate brokers, and recovered. Only questions of fact are in the case. A jury was waived, and no propositions of law were presented. As usual there is a conflict in the testimony of the witnesses, but the written evidence corroborates the testimony, on the fact, of the appellees.

It was proved that, through the agency of the appellees, a contract dated May 9, 1889, for a sale by the appellant to one Watts, was made, in writing, signed by appellant and Watts, and Watts made a deposit on it of \$300. Then followed correspondence between these parties as follows:

“CHICAGO, May 22, 1889.

MESSRS. GRIFFIN & DWIGHT:

Gents:—We understand from conversation Mr. S. Granger had with Mr. Watts that he can not wait until we can get order from court to sell the property corner Monroe and Paulina Sts. As we do not wish to insist on contracts that have been made, unless satisfactory to him, you may return him his money, when he delivers the abstract to property, if you think it advisable. We shall proceed to have the property sold by court to get it in shape, so that we may have no trouble in future, and it will be for sale and prompt title given as soon as this can be done.

Please send bill for abstract, etc., to my office, and will mail check.

Yours truly,

RODNEY GRANGER.

For estate John Granger.”

“CHICAGO, May 23d, 1889.

MR. RODNEY GRANGER:

Dear Sir:—In reply to your letter of the 22d inst., we inclose herein bill for money paid for abstract and inclose for commission on sale $2\frac{1}{2}$ per cent. The understanding with Mr. S. S. Granger yesterday was that both of you were to call

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here together to-day and arrange about another sale of the property. You can send us check by bearer for amount of bill as stated in your letter. We, of course, will be much pleased to render our services in finding another customer and closing another sale for you without further charges for commission in the matter.

Very truly yours,

GRIFFIN & DWIGHT."

"CHICAGO, May 30, 1889.

MESSRS. GRIFFIN & DWIGHT,
Chicago.

Gent'n:—We will place the property, corner Monroe & Paulina Sts., in your hands for sale for the period ending Oct. 1, 1889, at \$11,000. Should have any calls from other parties in regard to this property, will refer them to you.

Hoping that you may make sale by this time that will be mutually satisfactory to us both, I am,

Yours truly,

RODNEY GRANGER."

The contract between appellant and Watts provided "\$10,700 more to be paid on the delivery of a good and sufficient deed of conveyance within ten days. The seller herein further agrees to furnish a marketable abstract of title to the above described property. In case there are defects in this title, which can be perfected without unreasonable delay, the seller hereby agrees to remedy such defects at his own expense; but should the title to said property not prove good, then the said Watts' \$300 earnest money will be refunded."

The conclusion of the court below that the appellees had once earned their commissions seems to be fully justified. The appellant, however, insists that they waived their claim for commissions on that sale, and would be entitled to them only if they should make, as they did not, a sale under the authority of the letter of May 30th. The letter of May 23d rebuts any inference of such waiver. The judgment is affirmed.

Judgment affirmed.

JACOB WOOLVERTON ET AL.

V.

THE GEORGE H. TAYLOR COMPANY ET AL.

Corporations—Debts of—Director's Liability—Bill to Enforce—Secs. 16 and 25, Chap. 32, R. S.—Jurisdiction—Insolvency—Negotiable Instruments—Judgments and Decrees.

1. The word "creditor" means a person to whom a debt is owing by another person; standing by itself it means creditor at large.

2. Where a proceeding in a court of equity is to reach equitable assets, the remedy at law must first be exhausted, for the reason that there is no jurisdiction in equity while there remains an adequate remedy at law.

3. Insolvency can be proved in proceedings at law without the evidence of the return of an execution unsatisfied; while that is required in cases where a creditor's bill is filed, in other cases insolvency can be proved the same as any other fact.

4. The secondary liability of an assignor on a promissory note may be made out by showing that the maker was insolvent without proving that a suit was brought against him and was unavailing; where the facts show that such an action would be unavailing, no action need be brought to establish the assignor's liability.

5. Insolvency is the condition of inability to pay one's debts as they fall due, or, in the usual course of trade or business; such insolvency alleged in a bill seeking to enforce the liability under Sec. 16 of the statute on corporations is sufficient.

6. A court of chancery may submit an issue against a defendant to a trial by jury, and though ordinarily discretionary, such court may in a given case be bound to do so, where the law entitles the party to such trial.

7. No judgment at law is necessary to determine that parties filing a bill to recover under Sec. 16 are creditors. They may establish that they are creditors and the amount of the indebtedness, and reach the fund or liability created by said section, and distribute it among all those for whose benefit it is created, by an original bill in chancery.

8. In the case presented, this court holds that it was improper to refuse to grant leave to complainant to withdraw his replication to certain pleas, and to submit a motion to strike the same from the files for reasons stated therein; that the purely technical judgment on the issues made by the pleas as they stood, is the result of the court denying the motion, which should have been allowed, and that the judgment on the pleas can not stand, as it is a mere technical obstruction to reaching a just result in the case.

[Opinion filed December 7, 1891.]

43	424
54	382
132s	197

43	424
55	387

43	424
157s	488

43	424
77	664

Woolverton v. G. H. Taylor Co.

APPEAL from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

Mr. CONSIDER H. WILLETT, for appellant.

Messrs. TENNEY, CHURCH & COFFEEN and EDWARD W. RUSSELL, for appellees.

MORAN, J. The bill in this suit was filed against The George H. Taylor Company corporation, and against George H. Taylor, William H. Longley, John Manley and others, seeking to enforce against the individual defendants the liability under Sec. 16 of the statute on corporations, officers and directors assenting to an indebtedness in excess of the capital stock of the corporation.

The case has been in this court twice before, and is reported in 30 Ill. App. 70, that case on appeal in 132 Ill. 197. The case is again reported in this court in 37 Ill. App. 358. Upon the last hearing in this court the case stood as an attempt to recover on a simple indebtedness against the corporation alone, the other defendants having been dismissed out of it by the decree entered in the trial court.

The case now stands as a bill against the corporation and the defendants to enforce the liability which it was originally intended to reach. On the hearing in the Superior Court the bill was dismissed because it was not shown that the complainants had reduced their indebtedness to judgment against the corporation by an action at law. From this decree the present appeal is prosecuted. It was settled by the decision of the Supreme Court in *Woolverton v. Taylor*, 132 Ill. 197, that the method of reaching this liability of officers and directors created by Sec. 16 of the general incorporation act, is by a suit in equity. The principal question presented by this appeal is whether such liability can be reached by a suit in equity without the creditor or creditors seeking to enforce such liability in satisfaction of their debts, having obtained a judgment at law against the corporation and had a return of no property found upon an execution.

Sec. 16 provides: "If the indebtedness of any stock corporation exceed the amount of its capital stock, the directors and officers of such corporation assenting thereto shall be personally and individually liable for such excess to the creditors of such corporation."

In *Low v. Buchanan*, 94 Ill. 76, where it was first held that the liability created by Sec. 16 was to be enforced in a court of equity, great stress is laid upon the fact that the officers of the corporation, so assenting to indebtedness in excess of the capital stock, did not become liable to some particular creditor, but, in the language of the act, "to the creditors;" that is, all the creditors. In that case, nor in any of the numerous subsequent cases decided by our Supreme Court, in which it is held that the remedy to recover such a fund and to effect its distribution among the creditors can only be found in a court of equity, is any hint given that creditors were only those who had reduced their respective claims to judgment by an action at law. Sec. 25 of the general incorporation act provides, among other things, that "suits in equity may be brought against all persons who were liable in any way for the debts of the corporation by joining the corporation in such suit." Surely the liability for the debts of the corporation created by Sec. 16 of the same act may be reached by a suit in equity brought against the persons who have incurred such liability, and the liability being to the creditors of such corporation, all that is necessary to establish one's right to maintain the suit in equity is to show that he is a creditor of such corporation. The liability is to creditors. The word "creditor" means a person to whom a debt is owing by another person. The simple word "creditor" standing by itself, means creditor at large; so it is generally used and generally understood, and so it must be held to have been used in this statute. There is no indication in the statute and no intimation from the Supreme Court that the creditor or creditors who are to be benefited by this liability must be judgment creditors before they can avail themselves of the right to sue in equity for the application of this fund to the satisfaction of their debts.

Where the proceeding in a court of equity is to reach equitable assets, it is well settled that the remedy at law must be exhausted, for the reason that there is no jurisdiction in equity while there remains an adequate remedy at law; hence, it has been repeatedly held by the Supreme Court of this State, that before a bill can be filed to reach property and subject it to the claims of creditors, that can only be reached in a court of equity, a judgment at law must be obtained and the process of the court of law must have proved unavailing, and this is the class of cases relied on by the appellee to sustain the contention, that there should be a judgment at law against the corporation before the liability of these officers of the corporation created by Section 16 can be reached. But in this case the jurisdiction of the court of equity in no wise depends upon the exhaustion of the remedy at law. If the corporation is in default and is insolvent, the liability of the officers consenting to the indebtedness in excess of the capital stock may be reached by a suit in equity, not because said liability is an equitable asset, and to be reached only after the exhaustion of legal assets, but because the statute which creates this legal liability, as construed by the Supreme Court, gives the remedy for enforcing it to a court of equity and not to a court of law. This bill alleges the default of the corporation and its insolvency, and the consent of the officers to the indebtedness in excess of capital stock, and these allegations are sufficient to charge appellees under the law which declares their liability. The contention of appellees appears to be that the insolvency of the corporation can only be determined by the return of an execution unsatisfied. Such is not the law. Insolvency can be and is very frequently proved in proceedings at law, without the evidence of the return of an execution unsatisfied. That is required in cases where a creditor's bill is filed, but in other cases insolvency can be proved the same as any other fact. The secondary liability of an assignor on a promissory note may be made out by showing that the maker was insolvent, without proving that a suit was brought against him and was unavailing. Where the facts show that such an action would be unavailing, it is expressly held that no action

need be brought to establish the assignor's liability. *Humphreys v. Collier*, 1 Scam. 47; *Pierce v. Short*, 14 Ill. 144.

✓ Insolveney is but the condition of inability to pay one's debts as they fall due, or in the usual course of trade or business. Such insolvency is what is alleged in this bill and is, in our opinion, sufficient. But it is argued that the corporation has the right to trial by jury on the question of the indebtedness. Let it be admitted that the corporation has such right, and this is not an insuperable objection to the maintenance of the bill. A court of chancery may submit an issue against a defendant or defendants to a trial by jury, and though it is generally discretionary in the court to do so, it may in a given case be bound to do so where the law entitles the party to such trial. In the case of *Gage v. Ewing*, 107 Ill. 11, it is held that where jurisdiction is bestowed by statute upon a court of chancery in a case where the constitution entitles the party to the right of trial by jury, it is to be presumed that such trial will be allowed if asked, on a trial in chancery, in obedience to the constitution. The court there said: "Conferring jurisdiction in chancery is not excluding trial by jury. Courts of chancery may submit issues of fact to trial by jury, and although it is discretionary to do so in their ordinary course of practice, yet where there comes bestowal, upon such a court, of jurisdiction in a case where there existed before the adoption of the constitution the right of trial by jury, it is to be presumed that there would be in such case allowance of jury trial; that there would be obedience to the constitutional injunction; that the right of trial by jury as enjoyed at the time of the adoption of the constitution should remain inviolate."

If, then, the corporation defendant is disposed, upon the hearing in chancery of such case as this, to demand trial by jury of the fact of its indebtedness, it has only to insist on that right, and the court of chancery is empowered to grant such trial as fully as it can be obtained in a court of law. No judgment at law then is necessary to determine that the parties who bring the bill or in whose interest it is brought are in fact creditors. They may establish that they are creditors

Woolverton v. G. H. Taylor Co.

and the amount of the indebtedness, and reach the fund or liability created by Sec. 16, and distribute it among all those for whose benefit it is created, by an original bill in chancery. While this precise point has not been in terms expressly decided, we understand it to have been virtually determined by several cases in this State and in the Supreme Court of the United States. *Low v. Buchanan, supra*; *Tunesma v. Schuttler*, 114 Ill. 156; *Queenan v. Palmer*, 117 Ill. 619; *Stone v. Chisholm*, 113 U. S. 302.

It is contended that the decree dismissing the bill must be affirmed even though the suit might be maintained without alleging the recovery of a judgment at law, because there was an issue taken on pleas filed by defendants, and the result of the decree is in effect the finding of the issue in favor of the defendants, which it is said puts an end to the suit, whether the pleas were good in law or not. The record contains the statement or opinion of the court at the time of the hearing, giving the reasons which controlled the judge in rendering the decree. It plainly appears that the view of the court was, that without proof of the recovery of a judgment at law against the corporation upon the notes mentioned in the bill, the suit can not be maintained against the corporation, and the officers and directors claimed to be liable under Sec. 16. The decision was not at all grounded upon a finding of facts on the issue made upon the pleas. If we can not look to such statement, then it further appears that the complainant asked leave to withdraw his replication to these pleas, and to submit a motion to strike the pleas from the files for various reasons stated in the motion. This the court refused. It should have been granted and the motion to modify the orders sustaining the pleas should have been allowed. The purely technical judgment on the issues made by the pleas as they stood is the result of the court denying the motion which should have been allowed; under such circumstances the judgment on the pleas can not stand, as it is a mere technical obstruction to reaching a just result in the case. The judgment on the pleas will be set aside, the order dismissing the bill will be reversed, and the case will be remanded to the Superior Court, with

directions to proceed with the case in a manner not inconsistent with this opinion.

Reversed and remanded.

HUGH HUGHES

v.

ALBERT RUSSELL.

Mechanics' Liens—Sec. 35, Chap. 32, R. S.—Amendment of July 1, 1891—Notice of Claim.

1. Parties have no vested right in a remedy provided by law, and the legislature may properly change the mode of enforcing rights, and the new law will govern as to proceedings instituted after it goes into effect, no matter when the rights sought to be enforced accrued. But the law in force at the time that rights accrue is the law that measures and limits such rights.

2. In the case presented, this court holds that the plaintiff's right to his judgment in the court below is clear under Sec. 35, Chap. 32, R. S., in force when his action accrued, and declines to interfere therewith.

[Opinion filed December 7, 1891.]

APPEAL from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding.

This case was tried in the Superior Court on an agreed statement of facts as follows:

Hugh Hughes is the owner of the premises on the southwest corner of Monroe street and California avenue, Chicago, Cook County, Illinois.

In the spring and summer of 1891, and while still the owner thereof, Hughes built a three-story building on said premises. Hughes made a verbal contract with the defendants, Owen Brothers, to furnish material, and do the lathing and plastering on said building, for the sum of \$900, payment to be made as the work progressed.

Hughes v. Russell.

Albert Russell, plaintiff in this suit, furnished to said Owen Brothers laths for the construction of said building, to the amount of \$162.40, on a verbal contract, which laths were used in said building, and were delivered on the 11th, 12th and 15th days of May, 1891. There was no contract in writing between Owen Brothers and the plaintiff, Albert Russell. The amount of the bill for said laths, \$162.40, was due the plaintiff, Russell, on June 1, 1891, and no part of the same has ever been paid.

On June 13, 1891, a notice was served by the plaintiff, Albert Russell, on Hughes, of which the following is a copy:

“TO HUGHES, OWNER, OR AGENT OF OWNER:

You are hereby notified that I have been employed by Owen Brothers to furnish material, lath, upon your building, described as follows: On the southwest corner of Monroe street and California avenue, city of Chicago, county of Cook, State of Illinois; and that I shall hold the building, and your interest in the grounds, liable for the amount that is due me on account thereof.

Dated this 13th day of June, A. D. 1891.

(Signed) ALBERT RUSSELL.”

At different times, and as the work progressed, Hughes, on orders of Owen Brothers, paid the workmen on the job, and also paid Owen Brothers several amounts.

The last payment so made by Hughes was on June 6, 1891, and at that date the total amount of payment was \$835.23, leaving a balance of \$64.77 due Owen Brothers on the contract, when they completed the work, which they did on the 12th day of June, 1891. No contractor's sworn statement was ever requested by the owner, Hughes, nor given by the contractors, Owen Brothers.

June 23, 1891, Hughes was served with a notice, of which the following is a copy:

“TO HUGH HUGHES, Esq.:

You are hereby notified that we have furnished materials, to wit: Forty-five loads of building sand, which has been used on or for your house or building, described as follows: The building known as numbers 125, 127 and 129 South Cal-

ifornia avenue, in Chicago, Illinois, said material having been furnished to Owen Brothers, your contractors, for the erection of said buildings, and that we shall hold the house, building and your interest in the ground liable for \$74.25, the price of the materials furnished.

Dated this 23d day of June, A. D. 1891.

(Signed) THE GARDEN CITY SAND CO.

By C. B. Shefler, Pres."

Under this notice, September 2, 1891, suit was brought by the Garden City Sand Co. against Hughes and Owen Brothers, and on September 11, 1891, judgment was rendered therein against the defendants for \$64.77.

August 6, 1891, suit was brought by Russell, before a justice of the peace, against Hughes and Owen Brothers; Hughes was duly served with process, but Owen Brothers were not served and were not in court. Hughes, in open court, after trial commenced and before judgment was rendered, offered to pay to Russell his *pro rata* share of the \$64.77, still due Owen Brothers, on account of their contract.

A judgment was rendered against Hughes for \$162.40 and costs, from which judgment an appeal was taken to this court.

On the trial in the Superior Court judgment was rendered against appellant for the same amount as rendered by the justice, and to review said judgment this appeal is prosecuted.

Mr. E. A. ABORN, for appellant.

Messrs. WALLACE HECKMAN and J. G. ELSDON, for appellee.

MORAN, J. By the terms of Sec. 35, Chap. 32, R. S., relating to mechanics' liens, as it stood prior to the amendment which went into force July 1, 1891, the original contractor, whenever he desired to draw any money on the contract, was required to make out and give to the owner, or his agent, a statement, under oath, of the name of every sub-contractor, mechanic, or workman in his employ, or person furnishing material, and how much, if anything, is due or to become due to them or any of them; and the owner was to retain out of

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money due or to become due to the contractor, an amount sufficient to pay all demands due such sub-contractor, mechanic, etc., and pay the same to them according to their respective rights, and payments so made were to be considered the same as if paid to said original contractor. Said section provided that "any payment made by the owner before such statement is made, or without retaining sufficient money if that amount be due, or is to become due, to pay the sub-contractors, mechanics, workmen or persons furnishing materials, as shown by the statement, shall be considered illegal, and made in violation of the rights of persons intended to be benefited by this act; and the rights of such sub-contractors, mechanics, workmen or persons furnishing material to a lien shall not be affected thereby."

The statement of facts shows that appellant had paid something over \$800 to the contractor without requiring such statement, and that he did not retain sufficient money in his hands to pay appellee's claim. Such payment to the contractors was then illegal, and appellee's rights were not affected thereby. He gave notice of his claim in accordance with the statute, and took all steps necessary to the maintenance of his action against appellant and the original contractor. *Conklin v. Plant*, 34 Ill. App. 264; *Butler v. Gain*, 128 Ill. 23.

It is contended, however, that as this suit was not commenced till after July, 1891, when amended Sec. 35 went into effect, said amended section governs as to the rights of the parties. The amendment of Sec. 35 was in a particular affecting the rights of parties in their duties and relations to each other under the law, and not in a matter affecting the remedy.

Parties have no vested right in a remedy provided by law, and hence the legislature may properly change the mode of enforcing rights, and the new law will govern as to proceedings instituted after it goes into effect, no matter when the rights sought to be enforced accrued. *Turney v. Saunders*, 4 Scam. 527; *Barton v. Steinmitz*, 37 Ill. App. 141; *Templeton v. Horne*, 82 Ill. 491. But the law in force at the time that

rights accrue is the law that measures and limits such rights. The work was performed in this case, and the notice given before any change in the law. The lien was then fixed and the right of action complete. By the law as it then stood the rights and duties of the respective parties are to be ascertained.

Appellee's right to his judgment is clear under the statute in force when his action accrued, and the court committed no error in deciding in his favor.

The judgment of the Superior Court will therefore be affirmed.

Judgment affirmed.

43	434
59	391
43	434
65	372
162s	82

DAVID BLUMENFELDT

V.

MAX KORSCHUCK ET AL.

Mutual Benefit Societies—Expulsion of Member—Practice.

1. An ex-member of a mutual benefit association must exhaust his remedy in the order before he can appeal to the courts, either for reinstatement or damages for his expulsion.

2. If a member, or the beneficiary under a certificate to him, is suing the order for keeping him out of the lodge, or for money due upon a certificate, and an expulsion is set up as a defense, the question may be made whether the expulsion is valid or void.

3. Where no cause of action is stated in a given declaration, nor proof of the grievance alleged in it, this court will not inquire whether the proceedings on the trial were regular or not.

[Opinion filed December 7, 1891.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

Mr. L. M. SHREVE, for appellant.

Messrs. BLUM & BLUM, for appellees.

Blumenfeldt v. Korschuck.

GARY, J. This is an action on the case. The appellant was plaintiff below. The declaration sets out that there is a corporation organized under the law of the State of New York called the Grand Lodge of the Sons of Benjamin, and in the city of Chicago an association chartered by the Grand Lodge, called the Garden City Lodge of the Sons of Benjamin, of which the individuals who are the appellees here were "officers, trustees and agents representing said lodges and having control and management."

The grievance complained of is that the appellees maliciously confederated and conspired, and without any cause and in violation of the constitution and by-laws of the lodges, expelled the appellant, he being a member in good standing and entitled to the benefits and rights of the order. Both the Grand Lodge and Garden City Lodge were made defendants, but as they were not served with process, nor appeared in the cause, charges in the declaration relating to them are omitted.

The appellant was not present at the meeting of the lodge at which he was expelled, but testified that one Cohen, who is not made a defendant in this case, presented charges against him, and that four of the appellees expelled him. The only evidence that in fact the appellees participated in expelling the appellant is, that they were all members of the lodge, and that the vote for his expulsion was unanimous. The record is filled with scandal, admitted probably as evidence of malice, but in no way tending to prove the grievance complained of. There is no precedent for such an action as this if the proof was complete. The record, imperfect as it is, shows that the appellant took an appeal to the Grand Lodge, but did not prosecute it.

He must exhaust his remedy in the order, before he can appeal to the courts, either for reinstatement or damages for the expulsion. Niblack on Mutual Benefit Societies, Sec. 79; Chamberlain v. Lincoln, 129 Ill. 70.

Though if a member, or the beneficiary under a certificate to him, is suing the order for keeping him out of the lodge, or for money due upon a certificate, and an expulsion is set

up as a defense, the question may be made whether the expulsion is valid or void. *Ludowski v. Benevolent Soc.*, 29 Mo. App. 337; *Hoffman v. Grand Lodge*, 41 Mo. App. 359; *Supreme Lodge v. Zuhlke*, 30 Ill. App. 98; 129 Ill. 298.

There being no cause of action stated in the declaration, nor proof of the grievance alleged in it, it is useless to inquire whether the proceedings on the trial were regular or not. *Theodorson v. Ahlgren*, 37 Ill. App. 140. The judgment is affirmed.

Judgment affirmed.

FRANK RANSFORD
v.
JOSEPH H. WILLETS.

Actions—Pleading—Sale.

1. For the mere telling of a lie an action can not be maintained.
2. The lack of an express averment of *scienter* is not fatal.
3. There is no precedent for an action, not of debt, covenant or assumpsit, to recover money due by contract, but of trespass on the case for using the money with which the debt ought to have been paid, for other purposes.

[Opinion filed December 7, 1891.]

IN ERROR to the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

MR. JEREMIAH LEAMING, for plaintiff in error.

MESSRS. HAMLINE, SCOTT & LORD, for defendant in error.

GARY, J. This writ of error is prosecuted to reverse a judgment by default entered upon a declaration in case, as follows:

“For that whereas the plaintiff on, to wit, the 19th day of August, 1889, bargained with the defendant at his request to sell him a certain stock of goods, consisting of a certain stock

Ransford v. Willets.

of hosiery and underwear belonging to said plaintiff, contained, at that time, in the store of W. T. Moore & Co., No. 145 State street, Chicago, to wit, at the county aforesaid, and belonging to said plaintiff, for the sum of \$7,000, to be paid to him by said Frank Ransford, in order to induce said plaintiff to make said bargain then and there represented to this plaintiff that he was the owner of a stock of ribbons, contained in said store of W. T. Moore & Co. aforesaid, and falsely and fraudulently represented that there was no indebtedness against said ribbon stock, and that he did not owe any one on account of the same anything exceeding the sum of \$10; that he had resources outside of said stock of ribbons out of which he could obtain the money to pay for said stock of hosiery and underwear, and by means of the premises then and thereby falsely and fraudulently induced the plaintiff to agree to accept payment of the purchase price of said stock in the notes of said Frank Ransford, as follows, to wit:

\$1,000 note due in thirty days from the date thereof.

\$1,000 " " " sixty " " " " "

\$2,500 " " " four months " " " " "

\$2,500 " " " six " " " " "

and all bearing date the 19th day of August, 1889, and to accept a chattel mortgage as security for said two notes of \$2,500 each, covering said stock of hosiery and underwear, so sold by said plaintiff to said defendant, and also said stock of ribbons, so claimed by said Frank Ransford, defendant, to belong to him, and to deliver to said Frank Ransford, defendant, said stock of hosiery and underwear belonging to him and contained in the store of W. T. Moore & Co. aforesaid.

"Wherein as in truth and in fact said Frank Ransford, defendant herein, owed upon said ribbon stock, belonging to him as aforesaid, the sum of at least \$1,000, and thereafter from time to time, intending to cheat and defraud this plaintiff, sold and disposed of said stock so mortgaged as aforesaid in job lots at wholesale to pay for said indebtedness against the said ribbon stock, and appropriated the balance of the proceeds to his own private use, and thereafter and on, to wit, the 22d day of January, A. D. 1890, the said notes, of

\$2,500 each, not having been paid by the terms thereof, judgment was thereon confessed by this plaintiff for the amount thereof, together with interest and attorney's fees, in the total amount of \$5,125, in the Superior Court of Cook County, and the residue of said property, so mortgaged by said Frank Ransford as aforesaid to said Joseph H. Willets, and not sold by said Frank Ransford, defendant, was levied upon by the sheriff of Cook county, and thereafter and on, to wit, the ——— day of ——— A. D. 1890, the same was sold out at a public sale, and after due and proper notice of such sale had been made by advertisement, and the said stock so remaining, realizing at said sale the sum of seventeen hundred and twenty-six and sixty-four one hundredths dollars (\$1,726.64), which was the fair and reasonable market value of the said property.

"And the plaintiff in fact says that the defendant, by means of the premises on the day aforesaid, there falsely and fraudulently deceived the plaintiff as to the financial standing of said defendant, and in the sale of the said stock of hosiery and underwear, and falsely and fraudulently induced said plaintiff to part with the same, and deceived the plaintiff in inducing him to accept as security for said purchase price the said ribbon stock, as aforesaid, and thereby the said plaintiff was deprived of a large sum of money, to wit, the sum of \$4,000, in enforcing the payment of said notes as aforesaid, to the damage of the plaintiff of \$4,000, and therefore he brings his suit," etc.

The only representation alleged to have been made by the defendant below which is charged to have been false, is, that he did not owe any one on account of the ribbon stock exceeding the sum of ten dollars. Consistently with the declaration the ribbon stock may have been less in value than that sum; if so, the security which the plaintiff below fancied the ribbon stock gave him, was not affected by that representation. It is quite consistent with all that is alleged in the declaration that the defendant below may be a man of ample fortune with abundant property accessible to an execution. The alleged false representation can only be made material by showing that the ability of the defendant below to pay his debts de-

Elder v. Talcott.

pendent to some extent upon its truth, and that because of its untruth he was less able to pay than he would have been if it had been true. For the mere telling of a lie, an action will not lie.

The subsequent conduct of the defendant below in disposing of goods which he had the right to dispose of, at least such right is not negatived by the declaration, is not actionable, nor is the manner in which he used the proceeds.

There is no precedent for an action, not of debt, covenant or assumpsit, to recover money due by contract, but of trespass on the case for using the money with which the debt ought to have been paid, for other purposes. Such an action would be analogous to those held not to lie in *Smith v. Blake*, 1 Day, 258, *Green v. Kimble*, 6 Blackf. 552 and *Cooley on Torts*, 582, note 1, for setting up a false claim against or making a fraudulent levy upon the property of the debtor of the plaintiff.

No cause of action is shown by the declaration and the judgment must be reversed and the cause remanded.

The lack of an express averment of *scienter* is not fatal. *Farwell v. Metcalf*, 61 Ill. 372.

Reversed and remanded.

JOSEPH ELDER ET AL.

V.

GERTRUDE S. TALCOTT.

Gaming—Options—Negotiable Instruments—Note—Criminal Code, Sec. 132.

1. Margins advanced to brokers on contracts made to be settled on differences may be recovered from the person or persons to whom they were paid.

2. Upon a bill filed to enjoin an action at law on a promissory note made by the complainant to defendants, and to recover a sum paid by the complainant to defendants on the ground that said note had been given and said money paid by said complainant to indemnify and recompense said defend-

ant's for losses incurred by complainant to them in wagering or gambling contracts made for the purchase and sale of grain, it being alleged to have been agreed and understood that the dealing should be in differences, and that no grain should be received or delivered on such contracts, this court declines, in view of the evidence, to interfere with the decree for the complainant.

[Opinion filed December 7, 1891.]

IN ERROR to the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding.

Mr. D. M. KIRTON, for plaintiffs in error.

Mr. JOHN E. BURKE, for defendant in error.

MORAN, J. This was a bill filed to enjoin an action at law on a promissory note made by the complainant to defendants, and to recover back \$2,131 paid by said complainant to defendants on the ground that said note had been given, and said money paid by said complainant to indemnify and recompense said defendants for losses incurred by complainant to them in wagering or gambling contracts made for the purchase and sale of grain, it being agreed and understood between the parties that the dealing should be in differences and that no grain should be received or delivered on such contracts. The action at law upon the note was tried pending this suit in equity, and upon its determination a supplemental bill was filed setting up the result of the action at law. This case was heard by the chancellor on the following stipulation as to the facts:

"It is hereby admitted, in the above entitled cause, that the complainant herein made her promissory note to the defendants herein for the sum of \$2,000, and paid to the defendants herein the sums of \$1,800 and \$331 at the times alleged in complainant's original bill, and for the purpose of indemnifying and securing the defendant against losses which they had or might sustain in the grain transactions in question. It is admitted that the grain contracts in question were made and entered into by the defendants in their own name.

“It is admitted that in the suit at law mentioned in complainant’s supplemental bill in this cause, issue was joined, verdict and judgment were rendered, and proceedings were had as alleged and set forth in said supplemental bill.

“It is admitted that the question and issue as to whether the grain transactions in question were gambling transactions were submitted to and passed upon by the jury in said suit at law.

“It is also admitted that prior to the commencement of this suit, to wit, on January 23, 1889, the complainant herein made a demand upon said defendants for the return to her of said promissory note, and for the said money paid by her to said defendants.

“It is hereby stipulated that if the testimony is admissible in this cause, the defendants will testify that before the commencement of this suit and before demand was made upon them, as alleged in the original bill, the said defendants, as the brokers of the complainant, paid to other brokers the sum of \$4,131, said payment being for losses incurred in the grain transactions in question. The complainant reserves the right to object to said testimony and specify any legal ground of objection to its introduction.”

The court decreed in favor of complainant for the said amount of money paid over to the defendants and interest thereon.

It is contended here that plaintiffs in error can not be held to be “winners” of the money within the meaning of Sec. 132 of the Criminal Code; and to sustain this contention, *Higgins v. McCrea*, 116 U. S. 671, *White v. Barber*, 123 U. S. 392, and the case of *Watte v. Costello*, 40 Ill. App. 307, are cited. In the case last cited plaintiff was not suing under said Sec. 132 to recover money lost in gambling deals in grain, and no point was made as to who was the winner.

The instruction approved in said case was too broad in declaring that if the transactions conducted by the parties were gambling transactions, plaintiff could not recover for any margins advanced by him. We did not intend to hold that margins advanced to brokers on contracts made to be settled on differences could not be recovered back from the person

or persons to whom they were paid, and if such a meaning is to be drawn from the case, it must be regarded as not expressing the law as understood by this court. Whatever may be argued as the rule from the case decided by the Supreme Court of the United States, we are bound by the decisions of our own Supreme Court construing our statute. *Pearce v. Foote*, 113 Ill. 228, is decisive of the question now made. As here, the contracts were entered into by the brokers in their own name, and every view suggested herein by counsel for the plaintiff in error is taken up, considered and overthrown by the court.

In obedience to the law as laid down in that case, the judgment of the Circuit Court must be affirmed for the amount thereof after deducting the amount remitted by the voluntary action of appellee in this court. The decree is affirmed for \$2,131, and appellee will pay the cost in this court.

Decree affirmed.

GARY, J. I concur solely upon the ground that the Supreme Court have in the case cited defined the word "winner" as used in Sec. 132 of the Criminal Code.

Whether *Shaffner v. Pinchback*, 133 Ill. 410, conflicts with that decision, I do not feel at liberty to inquire.

GEORGE F. HARDING AND CHARLES E. MARBLE,

V.

JAMES H. SANDY AND A. C. SANDY.

Trespass—Real Property—Evidence—Instructions—Practice.

1. An owner may take from a wrongful holder his own, if he can do so without a breach of the peace.

2. The question whether it was error to refuse to instruct the jury in a given case to disregard the remark of an attorney in the case, made in his opening, upon the oral request of opposing counsel, will not be considered by this court. A written instruction to such effect should be asked.

3. This court deprecates the practice of assigning an excessive number of errors, and the making of briefs of undue length.

43	442
43	418
43	640
44	20
44	67
44	470
43	442
57	119
53	442
60	403
60	470
60	620

[Opinion filed December 7, 1891.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Mr. WILLIAM J. AMMEN, for appellants.

Messrs. SETH F. CREWS and ERNEST DALE OWEN, for appellees.

GARY, J. This is an action of trespass by the firm of Sandy Brothers, as plaintiffs, against the appellants, Harding and Charles E. Marble.

Through the whole case it was tacitly assumed that Harding was the owner of a building fronting north called the Harding block, at 170 Madison street, in Chicago, and one witness spoke of it, without objection, as "Mr. Harding's building."

In the discussion of the case, we shall, therefore, assume that ownership to be undisputed.

A lease was made by Harding to Marble March 25, 1886, running to April 30, 1891, for "the rear portion of the sixth floor of the building No. 170 E. Madison street, consisting of all that portion in the rear of and on the east side of the rear light-shaft, with access thereto through the hallway leading from the front hall, and across to, and common use with other tenants of the building, of the freight elevator, but reserving for other tenants of the same floor access to and free use of the said elevator," and March 29, 1886, another lease was made by Harding to Sandy Brothers, also running to April 30, 1891, for "all that part of the sixth floor of the building known as Harding block, number 170 Madison street, in the rear of the central light-shaft (except the hall to lead to the rear rooms), extending to the third or rear light-shaft, and also that portion on the west side of said light-shaft, with free use of and access to the freight elevator, for use of light job printing." Both leases are under seal.

The appellees' brief says, and we assume truly, without searching for the evidence of the fact, that when those leases were made and possession taken under them, there was no

partition dividing the premises demised by the one lease from those demised by the other. The rear light-shaft, as appears by the plats in evidence, was a space inclosed mainly by glass, twenty feet long north and south, and ten and one-half feet wide east and west, nearly midway between the east and west walls of the building.

After possession was taken under the leases, changes were made; first by placing partitions, so that a space sixteen and one-half feet long, along the west wall of the building, and six feet wide, the north end of which space was the line of the south side of the rear light-shaft extended westwardly, was divided from the premises occupied by Marble, and left open to access at the north end to, and in fact was occupied by, the Sandy Brothers. Afterward, by another change, a partition was extended across the north end of that space, and the partition along the east side of it removed, so that Marble had access to, and occupied it.

That Harding had those changes made and the property of the appellees thereon removed to the premises covered by the lease to the appellees, during hours when they were not there, is one of the principal grievances of which the appellees complain.

That the lease to them demised nothing south of what was west of the rear light-shaft, can not be made clearer by multiplying words about it than it is by reading the lease, and no testimony that attempts to extend the operation of the lease by conversation between one of the appellees and Harding is admissible, or if admitted, has that effect. If the space described did not pass under the lease to Marble, it remained with Harding, and the result is the same to the appellees either way; they can not make Marble and Harding jointly respond in damages for what one or the other of them had a right to take. And this raises the question of law presented by the fourth instruction given on behalf of the plaintiffs as follows:

“4. The court instructs the jury that a person in the actual peaceable possession of premises, is presumed to be there rightfully, and no one, not even the owner of the prop-

Harding v. Sandy.

erty, has a right to go upon the premises and forcibly eject the person so in possession of the premises, or any part of them; or remove his property therefrom against his will, unless the person so entering has some legal process from a court of competent jurisdiction, authorizing him to do so, or consent of the one in possession."

The profession is slow to unlearn what in *Brooke v. O'Boyle*, 27 Ill. App. 384, we called "the heresy introduced into the law of this State in 1866." The case there cited, *Fort Dearborn Lodge v. Klein*, 115 Ill. 177, holds that the owner may take from a wrongful holder his own, if he can do so without a breach of the peace. That case is cited with approval in *Lee v. Mound Station*, 118 Ill. 304, and *Gage v. Hampton*, 127 Ill. 87.

The Appellate Court of the Third District in *City of Bloomington v. Brophy*, 32 Ill. App. 400, cited, understood and followed it as we understand it. The contrary doctrine, for some time held in this State, was first adopted by the Supreme Court in *Reeder v. Purdy*, 41 Ill. 279, and was there based, so far as authority was regarded, more upon *Dustin v. Cowdry*, 23 Vt. 631, than any other case, and that in turn was based upon *Newton v. Harland*, 1 Man. & Gr. 644, 39 E. C. L. 952, and that case has been long since overruled in England. See *Low v. Elwell*, 121 Mass. 309, and *Souter v. Codman*, 14 R. I. 119.

The key note of the prosecution of this suit was struck when the counsel for the appellees in his opening to the jury stated in an "artless Japanese way" that he "would prove that the defendant Harding was the meanest landlord in Chicago," and one of the errors assigned is that the court would not then upon an oral request instruct the jury to disregard the remark.

If then, or at the close of the case, a written instruction to that effect had been presented and refused, the question whether, under a statute requiring the court to instruct only in writing and as to the law of the case, the refusal was error, would have arisen; now it does not.

It is impossible to go through the mass of matter presented

 VOL. 43.] Chapin & Gould v. Wabash Manufacturing Co.

by the appellants. They asked forty-five instructions of which eighteen were given as asked, seven as modified, and twenty were refused. They assigned twenty-nine reasons for a new trial, and assigned twenty errors here. Such a mode of presenting a case anywhere, either in the trial or an appellate court, is, as this court said in *Vail v. Drexel*, 9 Ill. App. 439, "an element of weakness."

A brief that is brief, which refers in every statement of fact to the page of abstract and record for its verity, is a great help; more than one hundred and fifty pages of discussion at large, is not.

Whether anybody, and if anybody, who, obscured the light, disturbed the possession, or encroached upon the easements which the appellees were entitled to under their lease, will, if the case is tried again, be subjects of inquiry, upon which nothing that could be said now would be of use.

Specifically for the error in the fourth instruction given on behalf of the plaintiffs, the judgment is reversed and the cause remanded.

Reversed and remanded.

CHAPIN & GOULD

V.

WABASH MANUFACTURING COMPANY AND CHARLES SHACKLEFORD, ASSIGNEE.

Sales—Trust Property—Pursuit of Proceeds of—Insolvency of Agent.

1. In order to pursue a trust fund, its identity as a fund must be preserved, so that it can be distinguished from all other funds, or if intermingled, that the intermingling was done without the consent of the *cestui que trust*.

2. It seems to have been contemplated in the case presented that the proceeds of certain goods would be mingled with the proceeds of the goods of an insolvent named.

3. This court holds that the assignee defendant should not be ordered to account for the credits, upon which in part certain goods were sold, it not being shown that he received such credits, or anything on account thereof.

[Opinion filed December 7, 1891.]

APPEAL from the County Court of Cook County; the Hon. FRANK SCALES, Judge, presiding.

The Wabash Manufacturing Company received on consignment from appellants, paper to the value of \$144.78, which it was to sell, and account to appellants for the proceeds. Thereafter the Wabash Manufacturing Co. made an assignment, and January 13, 1890, appellants filed a petition asking that the assignee be ordered to deliver to them such portion of the paper as might be remaining in his hands, if any, and if the same had been sold that he be directed to pay them the sum of \$144.78.

The assignee answered that the goods were sold long before the assignment, and the proceeds thereof intermingled with the other moneys of the Wabash Company and paid out in the ordinary course of business; and that there was no way of distinguishing such proceeds from the other property; that no part of said property or its assets came to the possession of the assignee. The paper was sold about December 1, 1889, some of it for cash and some on a credit of thirty to sixty days. What portion was sold for cash and what on credit does not appear, neither is it shown that any of the credits were outstanding or passed to the assignee by the assignment made December 26th; the money received was intermingled with the other funds of the company.

Mr. L. H. FOSTER, for appellants.

Messrs. GRIFFIN & WILE, for appellees.

WATERMAN, P. J. Appellants seek to follow the proceeds of trust property, without being able to distinguish such proceeds from funds derived from other sources. Whatever may be the rule in other States, it is established in this, that in order to pursue a trust fund, its identity as a fund must be preserved so that it can be distinguished from all other funds, or if intermingled, that the intermingling was without the

consent of the *cestui que trust*. School Trustees v. Kerwin, Ex'r, 25 Ill. 73; Wilson v. Kirby, 88 Ill. 566; Union Nat. Bank v. Goetz, 27 N. E. Rep. 907.

It is urged that the proceeds of the sale are to be charged as a lien upon the entire estate, because the proceeds of the paper were mingled by the consignee with funds derived from a sale of his own goods.

The petition filed in this case states the arrangement to have been that the Wabash Company was to dispose of the goods to the best possible advantage, and *account* to the petitioners for the proceeds thereof. Petitioners seem to have contemplated that the company would mingle the proceeds of these goods with the proceeds of its own property:

It is said by the Supreme Court in Union Nat. Bank v. Goetz, *supra*: "The principle upon which a trust fund is pursued, and its proceeds held subject to the trust, is that the trustee has wrongfully, and contrary to the intention of the owner, converted it, and where there has been a comingling of funds or property, that has been done without the consent of the *cestui que trust*."

To the suggestion that the assignee should have been ordered to account for the credits upon which in part the goods were sold, it is sufficient to say that it was not shown that the assignee received these credits or anything on account thereof.

The judgment of the County Court must be affirmed.

Judgment affirmed.

H. H. CARPENTER .

v.

S. T. WHITE.

Writ of Assistance—Affidavits—Practice.

1. Affidavits should set forth facts. It is for the court to draw conclusions from the facts proved.

2. In the case presented, this court declines, in view of the evidence, to

43	448
51	883
43	448
57	153
43	448
59	412

Carpenter v. White.

interfere with an order directing that a writ of assistance be issued, parties in possession of premises upon which a mortgage had been foreclosed—the same having been sold—refusing to give possession thereof.

[Opinion filed December 7, 1891.]

APPEAL from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

In the year 1887, Angie Page filed her bill to restrain the foreclosure of a mortgage upon the premises in question which she then owned.

On the 22d day of July, 1889, there was entered in the Superior Court in the said suit upon the cross-bill of the Mutual Building and Loan Association against Angie Page, Darins Morey and others, a decree of foreclosure of the said mortgage upon the said premises, the possession of which is now in controversy. Thereunder, after advertisement, the premises were sold by the master to Samuel T. White, the sale was confirmed, and on the 24th day of May, 1890, a master's deed of the premises was made to said White. The decree contained the usual clause requiring surrender of possession. It appearing that the said defendant, Angie Page, under the name of Angie Traeger, she having, since the filing of said cross-bill, intermarried with one Charles Traeger, and the said Charles Traeger, were in possession of the premises, and that a copy of the master's deed and a certified copy of the order of court confirming the sale had been served upon them, and a demand of possession made, the court directed that a writ of assistance be issued; from this order H. H. Carpenter has appealed.

Upon the hearing of the motion for said writ of assistance, John B. Fuller made affidavit that Angie Traeger and her husband, Charles Traeger, were the only persons in actual possession or occupancy of the premises at the time when the purchaser at the master's sale demanded possession; S. T. White made affidavit that on the 23d day of April, 1891, he went to the premises and found Angie Traeger living there; that she told him that the premises were hers and she was

going to continue in possession thereof; that she introduced Charles Traeger to affiant, and he, Charles Traeger, stated to affiant that he had entered into possession of said premises about November 1, 1890, and had since been continuously in possession.

On behalf of appellant the appellant's affidavit was filed, stating that he is in possession of the premises under a lease from one Oliver S. Patch to John A. E. Bok, bearing date of October 8, 1887, being for the term of five years; that affiant purchased said lease, and an assignment was made to him November 6, 1890, and he at once took possession and has since been in possession. Attached to said affidavit was a copy of a lease of said premises by Oliver S. Patch to John A. E. Bok, dated October 8, 1887, and terminating November 1, 1892. The lease provided that the lessee should not underlet or assign without the consent of the lessor, and had thereon an assignment by Bok to Carpenter. The affidavit of John A. E. Bok stated that he obtained a lease of said premises from Patch, that he took possession of said premises on the 8th day of October, 1887, and continued in such possession until the 6th day of November, 1890, when he sold and assigned said lease to H. H. Carpenter.

The affidavit of Joseph N. Barker set forth that Bok was in possession of said premises until November 5, 1890, when he assigned his lease to H. H. Carpenter. That Bok came to affiant's office, and affiant drew the assignment of the lease and a bill of sale of Bok's personal property; that Bok gave Carpenter possession of said property and Carpenter placed Charles Traeger in possession of said property to hold for him, Carpenter. Appellee introduced also his own affidavit and that of M. L. Raftree, that said Bok had told them that he agreed to sell his personal property and assign his lease to Annie Traeger; that she, in the office of said Barker, gave him a check in payment, and Bok signed his name upon the lease, as evidence of surrender of said lease; that said Annie Traeger did not represent that she was acting for any other person.

Mr. W. H. HILL and Mrs. MARY A. AHRENS, for appellant.

McNichols v. Hunt.

Messrs. THOMAS DENT and M. L. RAFTREE, for appellee.

WATERMAN, P. J. Angie Traeger and Charles Traeger are the only persons shown to be in actual occupancy of said premises. Angie Traeger was a party to the suit in which the decree of sale was entered.

She having since intermarried with Charles Traeger, and being in the occupancy of the premises, his occupancy is presumptively through her. The affidavits of appellant and Barker, that he, appellant, took possession November 6, 1890, and has since been in possession, and that appellant placed Charles Traeger in possession, are mere statements of conclusions. What did appellant do from which he concludes that he took possession? In what way, by what acts, did appellant place Charles Traeger in possession, should have been shown. Affidavits should set forth facts. It is then for the court to draw conclusions from the facts proved. *Waarich v. Winter*, 33 Ill. App. 36; *Shultz v. Plankinton Bank*, 40 Ill. App. 462.

Charles Traeger, who is shown to be an occupant of these premises, makes no statement that he so holds under appellant, nor does Angie Traeger claim to be occupying under authority conferred by appellant. The impression left by a consideration of these affidavits is that appellant is acting merely as the instrument of Angie Traeger, and that she it is who is the real assignee of the Patch lease.

The order of the Superior Court is affirmed.

Order affirmed.

M. McNICHOLS

v.

F. T. HUNT.

Appeal and Error—Practice.

1. If upon appeal from the judgment of a justice it appears that the cer-

tificate to the transcript is defective, a rule on the justice to supply a proper certificate may be obtained. • It is not proper to strike out the transcript on file, though the same be imperfect, it being sufficient to give the court jurisdiction of the subject-matter.

2. There is no legal connection or repugnance between the denial of a continuance at one term, and a call for trial in the first week of the succeeding term.

[Opinion filed December 7, 1891.]

APPEAL from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding.

MESSRS. SPARLING & SURINE, for appellant.

MR. C. J. MICHELET, for appellee.

MORAN, J. There is no merit in this appeal. Appellant commenced an attachment before a justice of the peace against appellee and obtained a judgment, which judgment said appellee appealed to the Superior Court. The record shows that a transcript was filed in the Superior Court on April 5, 1890, and the case was reached for trial on February 26, 1891. At the trial, appellant sought to have the justice's certificate to the transcript stricken out. The court denied the motion; appellant then refused to proceed with the trial of the cause, and on motion of appellee the court dismissed the suit.

It is contended that the court could not proceed to try the case because the transcript was defective. If there was any defect in the certificate, appellant might have obtained a rule on the justice to supply a proper certificate. It would not be proper for the court to strike out the transcript on file. The objections to it were merely technical and it was sufficient to give the court jurisdiction of the subject-matter. *Fink v. Disbrow*, 69 Ill. 76; *Buettner v. The Norton & Dickinson Manufacturing Co.*, 90 Ill. 415.

There was no error in the action of the court, and the judgment must be affirmed.

Judgment affirmed.

McNichols v. Hunt.

[*Upon petition for rehearing, opinion filed March 29, 1892.*]

GARY, J. On petition by appellant for rehearing, our attention is called to the fact that the former opinion omits to notice the point made by him, that the "papers" of the case before the justice had not been on file ten days before the first day of the term at which the case was disposed of.

The facts are these: The papers were filed February 26, 1891. On that day the appellant moved the court to strike the cause from the calendar, and continue it for that, among other reasons. The court denied the motion and the appellant excepted. But in fact the cause was continued, under the general provision of the statute as to "causes and proceedings pending." Sec. 56, Chap. 37, Ill. Stats., "Courts."

The March term commenced Monday, March 2d. On the 4th, the case was called for trial, and although the same cause (whether good or bad we do not need to say) for a continuance then existed as to the March term which the week before applied to the February term, yet the appellant did not ask for any delay, but moved only to strike out a certificate made upon the papers by the justice after they had been filed in court. This the court refused. As leave might have been given to make that certificate, there was no reason to strike it out. If the court felt its dignity trenched upon, the appellant was not concerned.

The appellant refused to try his case, and did not ask for a continuance; the court had no alternative, and dismissed it on motion of the appellee.

This court has no judicial knowledge of the size of the docket of the Superior Court. The call at the March term may, for aught we know, have begun at number one, and reached this case on the third day of the term. There is no legal connection, or repugnance, between the denial of a continuance at the February term, and a call for trial in the first week of the March term.

Rehearing denied.

THE WISCONSIN CENTRAL RAILROAD COMPANY

V.

MARCELLA H. ROSS, ADMINISTRATRIX.

Master and Servant—Railroads—Personal Injuries—Negligence of Master—Defective Track.

In an action brought to recover for the death of a brakeman, the same being alleged to have occurred through the negligence of a railroad company named, the contention being whether the defendant, against whom judgment was obtained, was responsible, the plaintiff having been employed by a combination of companies doing business under a certain name, this court holds, in view of the evidence, that defendant company was in said combination, and that it was liable, severally or jointly, with the other companies so operating, for the injury in question.

[Opinion filed December 10, 1891.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Mr. HENRY S. BOUTELL, for appellant.

Messrs. BRANDT & HOFFMAN and J. S. KENNARD, JR., for appellee.

MORAN, J. Appellee's decedent was a brakeman on a train of cars, and was jerked or jolted by the car on which he was standing being thrown from the track, so that he fell and was killed by the train running over him.

At the time of the accident the train was passing over a piece of railroad known as the Pan Handle, and it was shown that the track was in a defective condition, which probably caused the accident. The main contest is over the question whether the right defendant was sued, or rather, whether the defendant against which the verdict and judgment went was in any manner responsible for the injury.

It was shown that the engines drawing the train were marked "W. C. L.," which letters stood for "Wisconsin Central Line," which latter was not the name of a railroad com-

pany or corporation, but was a name under which several railroad companies operated in carrying on their business under a contract or arrangement between them. The evidence tended to show that deceased was employed and paid by the combination of companies known as the Wisconsin Central Line. It may be doubtful whether there was sufficient evidence submitted to the jury to sustain a finding that the Wisconsin Central Railroad Company was one of those composing the Wisconsin Central Line, but upon the motion for a new trial appellant introduced a receipt which contained the names of companies composing the Wisconsin Central Line, and among others is that of the Wisconsin Central Railroad Company. This was evidence to sustain the verdict rendered, and we are of opinion was sufficient, being uncontradicted and coming from appellant itself, to show that appellant was in the combination and operating under the name of the Wisconsin Central Line. That being so, it was liable severally, or jointly with other companies operating with it under the general name, for all negligence of any one of the companies composing the combination which resulted in injury to a person to whom the duty of care was due from said combination. *Consolidated Ice Machine Co. v. Kiefer*, 26 Ill. App. 466.

There is no question of law in the case, and on the question of fact presented our conclusion is against appellant.

The judgment must therefore be affirmed.

Judgment affirmed.

WATERMAN, P. J. I am of the opinion that, it appearing that at the time of the accident appellant was not operating any trains, but that Edwin H. Abbott and John A. Stewart, as trustees for the first mortgage bondholders, were then in actual possession and occupancy of and operating its road, this action can not be sustained against appellant.

I am also of the opinion that the evidence as to the employment of the deceased by, and as to the train by which he was killed being a train of, the Chicago, Wisconsin & Minnesota Railroad Company, is such that the verdict and judgment can not be sustained.

THOMAS F. McKEY
v.
WILLIAM P. NELSON AND JOHN L. NELSON.

Contracts—Right of Architect to Add to Building Contract—Extras.

Where parties, wholly upon the assurance of an architect that they will be paid, he having no authority to accept bids or make contracts, do work, not at the request of the owner of a building in process of construction, and which they had no reason to suppose he would regard as an extra, no request by him will be implied.

[Opinion filed December 10, 1891.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

Messrs. DOOLITTLE, McKEY & TOLMAN, for appellant.

Messrs. GRIFFIN & WILE, for appellees.

GARY, J. Three kinsmen, all named McKey, employed the same architect to make plans, etc., and receive bids for the erection of two houses for each McKey.

The architect had no authority to accept bids or make contracts. The contracts referred to plans, etc., attached. The appellees bid for the glazing on all the houses, and their bids were accepted. They examined only the plans of the two houses of one of the other McKeys, being told by the architect that all six houses were substantially alike, with some unimportant differences that would not affect the cost. No plans were, in fact, attached to the contract signed by the parties to this suit. The appellant had no knowledge of what plans the appellees examined.

Before the appellees began work on the appellant's houses, which accorded with the plans of those houses, they saw that one of them was constructed to require bent glass in a window; they told the architect they did not figure on bent glass, and he told them that the bent glass would be an extra, put it in

and he would see that they were paid for it. Testimony as to this conversation was objected to by the appellant, and after it was received he moved to strike it out, and took exceptions to the action of the court in receiving and retaining it in the case, so that the error is in the record. The cause was submitted to the jury without instruction, but the counsel of the appellees, in his closing argument, told them that when the architect said that he would see that the appellees were paid for the bent glass, it was the same as though the appellant had said it; it is clear, therefore, that the verdict rests upon that theory.

Whether there was any contract between these parties, because of its incompleteness by reference to plans attached when none were attached, is not now a question.

The appellees, wholly upon the assurance of the architect, did work, not at appellant's request, which they had no reason to suppose that he would regard as an extra, and which they have made part of his freehold. The law under such circumstances will not imply a request by him. If they were at liberty to reject the contract they signed, because of its incompleteness, and yet went on under it, they must take it as it is. They knew, and the appellant did not know, when they signed it, that the plans they had seen were not the plans of the two houses which that contract related to. The architect had no authority to add to its terms. *Adlard v. Muldoon*, 45 Ill. 193; *Campbell v. Day*, 90 Ill. 363. Under such circumstances the appellant is not liable.

The case of *Sexton v. City of Chicago*, 107 Ill. 323, does not present the question here decided. It was held there that, as the plans and specifications showed no details for the superstructure of sky-lights, the printed forms on which bids were made which mentioned sky-lights did not bring such superstructure within the work which the contract required Sexton to do. The court first say that this state of facts "conclusively shows the sky-lights were not embraced within the contract;" and then follow with a recital of what took place between Sexton and a draughtsman in the office of the city architect, without a very clear showing as to what extent

the city was responsible for the acts of its officers and employes in the line of their official duty. On the other point in that case as to plans, etc., it does not appear that the contract referred to plans, etc., attached to the contract, and those upon which Sexton relied were the original of which the city had furnished him copies.

Then, upon the *quantum meruit* for the work that Sexton had done, upon the hypothesis that the difference between the city and Sexton as to plans avoided the contract, Sexton had done that work under his own correct construction of the contract, and therefore the point was not in the case. But if his construction had been wrong, he did the work in good faith, in execution of the contract as he understood it. Here, the appellees did the work with their eyes open, knowing before beginning that the bent glass was called for by the plans that should have been attached to the contract, trusting to the unauthorized assurance of the architect.

The judgment is reversed and the cause remanded.

Reversed and remanded.

MARIA CROWE

V.

PETER F. WOLFF.

Agency—Sale of Real Estate—Recovery of Commission.

1. In an action brought to recover a sum alleged to be due as a commission on a sale of real estate, this court declines, in view of the evidence, to interfere with the judgment for the plaintiff.

2. The action being upon a special contract, a contention that there can be no recovery under the common counts because the agent did not do all that he was bound to do thereunder—not only find a purchaser, but prepare the papers for conveyance, etc., the owner having sold the property—and that the principal, not having availed himself of the offer, obtained no benefit from what the agent did, is unavailing where there is no evidence that it was the understanding that the agent should prepare the papers for conveyance, etc., or that it was the custom for the agent who makes a sale to do so.

Crowe v. Wolff.

[Opinion filed December 10, 1891.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

Appellant being the owner of a lot on Clark street in Chicago, received from appellee a letter asking her if the property was for sale, and if so, for what price. She went to his office and told him he might sell it for \$25,000 cash. September 11th she wrote to appellee, stating that she had decided to withdraw the property from sale. This letter he testifies he never received. September 12th he went to her house and told her he had an offer; he declared he told her an offer of \$20,000, one-half cash, balance in one or two years, with interest at six per cent.

She testifies he told her that he had an offer of \$25,000. A few days thereafter she sent him a postal card saying she would be down to his office. She went down, looked at a contract which appellee had drawn to sell the property to a Mr. Clark for \$20,000, one-third cash; this she refused to sign and left the office.

She shortly afterward sold the property for \$21,000, all cash.

Appellee told her that if he made a sale his commissions would be two and one-half per cent.

Clark testified that he offered, was ready, able and willing to purchase the property for \$20,000—one-half cash, balance one or two years' time, with interest at six per cent.

A jury was waived and the cause tried by the court. The court found for the plaintiff and rendered judgment for \$500.

Mr. M. J. DUNNE, for appellant.

Messrs. KRAUS, MAYER & STEIN, for appellee.

WATERMAN, P. J. The question presented by this record is one of fact. Did appellant authorize appellee to sell her property for \$20,000 upon the terms offered by Clark?

Appellant denies that she did this. Appellee declares that she did.

While a reading of the record leaves upon our minds the impression that she, rather than he, told the truth about this matter, it is impossible for the court to say that there was in her favor such a preponderance of evidence as will justify us in reversing the finding and judgment of the Circuit Court.

It is urged that as the action is upon a special contract, there can be no recovery under the common counts, because the agent did not do all that he was bound to thereunder, viz., not only find a purchaser, but prepare the papers for conveyance, etc., and the principal, not having availed herself of the offer, obtained no benefit from what the agent did.

In regard to this, it is sufficient to say that there was no evidence that it was the understanding that appellee should prepare the papers for conveyance, etc., or that it is the custom for the agent who makes the sale to do so.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

THE PEOPLE OF THE STATE OF ILLINOIS EX REL.

V.

JOHN P. ALTGELD.

Mandamus—Jurisdiction—Bill of Exceptions.

1. In this State the judicial powers of government are vested in courts, and persons not members thereof can not exercise judicial functions.

2. As an individual, a judge has no power to make judgments or judicial records; these things he can only do when he is acting as a court.

3. The settling of a bill of exceptions is a judicial act.

4. This court can not command one who is no longer a judge to exercise judicial functions—to do a judicial act.

5. The rule that bills of exception settled and signed by the judge who tried the cause, although after the expiration of his term of office, should be recognized as regular and valid, does not obtain in this State.

6. This court has no power to settle a bill of exceptions, that is, make or

The People v. Altgeld.

alter a portion of the record of a lower court as to a case tried therein; nor has it authority to set aside a judgment of an inferior court and grant a new trial unless reversible error is found in the record.

[Opinion filed December 11, 1891.]

Petition for writ of mandamus.

Messrs. WEIGLEY, BULKLEY & GRAY, for appellants.

Messrs. KRAUS, MAYER & STEIN, for appellee.

WATERMAN, P. J. This is an application to this court for a peremptory writ commanding respondent, who was one of the judges of the Superior Court of Cook County, to sign a certain bill of exceptions presented to him, or to settle and sign a true bill of exceptions in the case of Hanchett v. Bulkley, lately tried before him. The petition was filed July 20, 1891.

The respondent, in his answer, after denying that he had ever refused to sign and settle a true bill of exceptions in said cause, further answered that on the first day of August, 1891, by virtue of a resignation by him made to take effect on that day, he ceased to be and is no longer a judge of the said Superior Court.

The relator, in his replication, passed by the allegation that the respondent is no longer a judge of the Superior Court; and the respondent thereupon demurred to said replication. There are, in respect to courts and bills of exceptions, certain well settled rules, by which our action upon this application is to be determined; among these are, that in this State the judicial powers of government are vested in courts, and that persons not members of such courts can not exercise judicial functions: Hoagland v. Creed, 81 Ill. 50; Bishop v. Nelson, 83 Ill. 601; People v. Maynard, 14 Ill. 419; Hall v. Marks, 34 Ill. 359; that as an individual, a judge has no power to make judgments or judicial records; these things he can only do when he is acting as a court: Ling v. King & Co., 91 Ill. 571; that the settling of a bill of exceptions is a judicial

act: *Emerson v. Clark*, 2 Scam. 489; *Culliner v. Nash*, 76 Ill. 515; *Hawes v. The People*, 129 Ill. 125.

We are asked in this proceeding to command one who is no longer a judge to exercise judicial functions—to do a judicial act.

We are clearly of the opinion that such action upon our part would be entirely unwarranted. If one who has ceased to be a judge, may be compelled by the mandate of a Superior Court to act as a judge, it is difficult to see why he may not, of his own motion, without any mandate, so act.

In *The People v. Pearsons*, 3 Scam. 270, the court said, in substance, that a person who was no longer a judge could not be compelled to settle a bill of exceptions. In *DeHaas v. Newago*, 46 Mich. 12, the court declined to issue a mandamus to compel the settling of a bill of exceptions by one who had resigned since the filing of his answer to the rule to show cause. In *Phelps v. Conant*, 30 Vt. 277, it was held that the presiding judge of the County Court could not amend the bill of exceptions after his term of office had expired. In *The State v. Barnes*, 16 Neb. 37, it was held that under the statute of that State, the judge who tried a cause had authority to settle a bill of exceptions therein, after the expiration of his term of office. In *Fellows v. Tait*, 14 Wis. 156, and *Hall v. Hazelton*, 21 Wis. 321, it is said to be the practice in Wisconsin to recognize as regular and valid bills of exception settled and signed by the judge who tried the cause, although settled and signed after the expiration of his term of office. We are not aware that any such practice has ever existed in this State.

It is suggested that the court should either compel the respondent to settle and sign a bill of exceptions in the case of *Hanchett v. Bulkley*, to which this proceeding is ancillary, or itself settle the bill of exceptions, or grant a new trial in the *Hanchett and Bulkley* case.

This court has no power to settle a bill of exceptions, *i. e.*, make or alter a portion of the record of the Superior Court as to a case tried in that court; nor has it authority to set aside a judgment of an inferior court and grant a new trial, unless reversible error is found in the record.

Newborg v. Freehling.

The demurrer of the respondent is sustained and the petition dismissed.

Petition dismissed.

DAVID L. NEWBORG
v.
LEOPOLD M. FREEHLING.

Limitation—Statute of—Sec. 18.—Pleading—Statutes.

1. Where a statute is relied upon for a recovery or as a defense, the pleader need not refer to or negative an exception or proviso, where it is not contained in the enacting clause.

2. In the case presented, this court holds that defendant's demurrer to plaintiff's second replication should have been overruled; that if defendant desired to avail himself of the benefit of the exception to the statute in question he should have set it up by way of rejoinder, and that the judgment for the defendant can not stand.

[Opinion filed December 7, 1892.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

The action in this case was brought on a judgment rendered in the State of Michigan. The defendant pleaded the Illinois statute of limitations of five and ten years respectively, to which the plaintiff under leave filed four replications. Defendant having demurred to such replications, the court below sustained said demurrer and entered judgment for costs against the plaintiff.

The second replication alleges that at the time the cause of action accrued, defendant was out of the State, and afterward returned, which return was the first to the State after the accruing of the several causes of action, etc., and also alleges that plaintiff commenced this action within five years after defendant's first return as aforesaid.

Mr. ISRAEL COWEN, for appellant.

Messrs. BLUM & BLUM, for appellee.

WATERMAN, P. J. Section 18 of the statute of limitations is as follows: "If, when the cause of action accrues against a person, he is out of the State, the action may be commenced within the times herein limited, after his coming into or return to the State. * * * But the foregoing provisions of this section shall not apply to any case when, at the time the cause of action accrued, or shall accrue, neither the party against nor in favor of whom the same accrued, or shall accrue, were or are residents of this State."

This section in its first clause states a condition which will constitute a bar to the running of the statute; it then states an exception to the rule created by the first clause. The plaintiff was not bound in his replication to negative such exception. If the defendant desired to avail himself of the benefit of the exception, he should have set it up by way of rejoinder.

"It is a well recognized rule of pleading that where a statute is set up and relied on for a recovery or as a defense, the party pleading need not refer to or negative an exception or proviso, unless it is contained in the enacting clause." Hyman v. Baine, 83 Ill. 256; Partoues v. Holmes, 33 Ill. App. 312; 1 Chitty's Pleadings, 246-7, 16th Am. Ed.

The demurrer to the second replication should have been overruled.

For the error indicated, the judgment of the Circuit Court is reversed, and the case remanded.

Reversed and remanded.

Monteith v. Gehrig.

JOHN MONTEITH
V.
JOSEPH GEHRIG.

Trespass—Former Adjudication.

In an action of trespass *quare clausum fregit*, this court holds that the question raised therein is *res adjudicata* and affirms the judgment for the defendant.

[Opinion filed December 7, 1891.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

On the 27th of July, 1885, appellee obtained before a justice of the peace a judgment against appellant in an action of forcible detainer.

Appellant, on the 1st day of August, perfected an appeal to the County Court. On the 3d day of August appellee issued a distress warrant and appellant's premises were entered and his goods seized thereunder. It was admitted that appellee obtained judgment against appellant in the distress proceedings. Appellant brought an action of trespass against appellee for the entry and removal of goods under the distress warrant.

The Circuit Court, upon the trial, directed the jury to return a verdict of not guilty, which they did. There was judgment on the verdict and the plaintiff brings this appeal.

Mr. LOUIS WASHINGTON, for appellant.

Messrs. GEORGE SPARLING, C. A. SURINE and J. C. PATTERSON, for appellee.

WATERMAN, P. J. The judgment in the distress proceedings, from which no appeal was taken, established the right of appellee to distrain; if appellant desired further to contest

such right, he should have appealed from that judgment. As it is, the question raised in this case is *res adjudicata*, and the judgment of the Circuit Court must be affirmed.

Judgment affirmed.

ELLEN P. VAIL

V.

WILLIAM J. ARKELL AND LUCY W. DREXEL ET AL.

Cross-bills—Judgment and Decrees.

1. A cross-bill is a bill filed by a defendant in a given suit against the plaintiff therein, or other defendants therein, or both, touching the matter in question in the original bill.

2. In the case presented, the original bill prayed for an injunction restraining persons named from interfering with certain premises. The defendants therein filed a cross-bill asking for an injunction restraining complainant and another from interfering with the taking possession thereof by them. A second cross-bill was filed by a third person, claiming a right to redeem the same; she was made a party to both bill and cross-bill, in neither of which was any allegation showing why she should be a party, neither showing any ground of relief against her, nor asking for any. This court holds that she could have successfully demurred to both.

3. Where a trial court renders a decree variant from that directed by the Appellate Court in a given case, an appeal may be had therefrom, or a writ of error sued out. A court of equity will not look with favor upon a claim that such decree was rendered, where it is not made for some years after the rendition thereof.

4. This court holds that there is nothing in the charge that the master began the publication of notice of sale prior to the expiration of the time fixed for payment, that the amendment to the decree was purely formal, and that the decree remained a judgment as of the date of its entry.

[Opinion filed December 7, 1891.]

APPEAL from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding.

One Annie M. Miller filed in the Circuit Court her bill for an injunction restraining William J. Arkell and Lucy W.

Vail v. Arkell.

Drexel from interfering with her possession of certain premises, she claiming an interest therein by virtue of an alleged lease by Joseph W. Drexel, to her, of certain premises described as block five (5), etc., in certain subdivisions of the north half ($\frac{1}{2}$) of Sec. nineteen (19), township thirty-eight (38), range fourteen (14). Ellen P. Vail was made a party defendant, the only allegation as to her, being that she claimed some interest in the premises. No relief against her was asked.

The defendants, Arkell and Drexel, answered the bill, denying that the complainant had any such lease or any interest equitable or otherwise in the said premises, and filed a cross-bill alleging that the said Annie M. Miller and Alexander Miller, being unlawfully in possession of lots in said block five, exercise acts of ownership over the whole block of which they allege they are the owners, and trespass upon the rights of complainants in said cross-bill, and that said Annie and Alexander Miller threaten and intimidate the tenants of orators on said premises, and threaten to commit further trespasses and to drive off with force orators' tenants and prevent orators from taking possession of said premises by tenants. The cross-bill asked for an injunction against the said Annie and Alexander Miller, restraining them, etc. Ellen P. Vail was made a party defendant to this cross-bill, but the bill set up no title in her and asked for no relief as against her.

Ellen P. Vail answered the bill of Annie M. Miller, the cross-bill of Drexel and Arkell, and filed her cross-bill, alleging that on the 14th day of July, 1883, she was the owner of an equal undivided half part of the lots and lands in said bill and cross-bill described, and of the north half of Sec. 19 in the town of Lake, in the county of Cook and State of Illinois, subject to the payment of certain purchase money to one Joseph W. Drexel; that in March, 1875, Joseph W. Drexel filed his bill to foreclose the agreement of purchase under which the said Ellen P. Vail claimed title, making her and others parties defendant thereto; that a decree was entered decreeing the payment of the money found due on such contract within sixty days; that she sued out a writ of error to

reverse said decree, and it was reversed by the Appellate Court and ordered to be set aside and wholly for nothing esteemed; that said cause was docketed in the Circuit Court, and the bill, against the protest of her, the said Ellen P. Vail, amended, but that the amendments did not materially alter the allegations of the bill as passed upon by the Appellate Court; that said bill was without equity; that the only order the Circuit Court was authorized to make was an order dismissing the bill; but notwithstanding this, the Circuit Court entered a pretended decree inconsistent with the opinion and decree of the Appellate Court; that by said decree the defendants thereto were ordered to pay the sum of \$135,842.45, with interest and costs. And thereupon the complainant, Joseph W. Drexel, was to execute and deliver a warranty deed of said premises. The cross-bill further sets forth that said decree was in direct violation of the order of the Appellate Court, and of the law of the case as determined by the Appellate Court; that notwithstanding the order of the Appellate Court, said decree ordered that in default of such payment the said land should be sold by the master, and that out of the proceeds the master should pay to said Drexel the amount found due as aforesaid, with interest, etc. Alleges that said decree was illegal and void because it contained no provision for redemption. That said decree was amended October 9, 1883. Further alleges that the master gave public notice for three weeks that he would sell said premises; alleges that no valid notice could be given until the expiration of thirty days from the date of said amendment to said decree. That the date of the first publication of notice was October 13, 1883, and of the last, October 27, 1883. Alleges that said notice was premature, illegal, unauthorized and void; that said decree was placed upon the record of said Circuit Court at the September term, 1883, of said court. Alleges that complainant and her co-defendants were entitled to thirty days from and after the expiration of said September term of said Circuit Court in which to pay said sum so found due as aforesaid. That on the 5th day of November said master pretended to offer said premises for sale; that there was no bidder save

said Drexel, and that he became the purchaser. Alleges that while said decree and sale are void, yet complainant offers to pay the amount of said decree, together with interest and costs; that the master has not made to said Drexel any valid conveyance of the said premises or any part thereof; and that no valid conveyance can be made, and that she and her co-defendants have the right to redeem said premises. Waives answer under oath and prays for a discovery as to all sales of any portion of said premises, an accounting, and, after payment by her of the amount so found due as aforesaid with interest and costs, a conveyance of said premises by the defendants to complainant and her co-defendants.

A demurrer to this cross-bill was filed by Lucy W. Drexel and Wm. J. Arkell, executors of the last will of Joseph W. Drexel and Lucy W. Drexel, which demurrer was sustained and the bill dismissed.

Messrs. ROBERT RAE and JAMES W. BEACH, for appellant.

The *status* as to the legal ownership of the property in question at the time of the making of the lease to the complainant Miller was fixed and determined by this court in the case of Vail, impleaded with, etc., v. Joseph W. Drexel, 9 Ill. App. 349. It was then ruled that Asa Vail was the owner of the premises and Drexel the mortgagee.

The original bill prayed for an injunction restraining Arkell and Mrs. Drexel, representatives of the estate of Drexel, deceased, and also prayed for the enforcement of the lease in question and to quiet complainant's possession. The cross-bill of Arkell and Mrs. Drexel was for a decree canceling the lease and compelling the lessee to surrender possession of the premises to them and not to Mrs. Vail. The cross-bill was germane to the original bill of complaint.

The cross-bill of Ellen P. Vail, who was a defendant to the original bill of Mrs. Miller and also the defendant in the cross-bill of Drexels, was brought for the purpose of cross-litigation for the purpose of obtaining the benefit of a former decree of the court and of carrying it into execution, and was brought for the purpose of giving her affirmative relief on the

matters and things set up as a defense to the pretensions and claims of the Drexels in their cross-bill, and is responsive to the allegations set up in said cross-bill. As to new matter so responsive, it is a supplemental bill against the Drexels, and protective of the title of the Millers to the term held by them under the lease made by Vail, and which rights the Millers' original bill is filed to preserve. Story's Equity Pleading, p. 16.

The cross-bill of Arkell and Mrs. Drexel and the cross-bill of Ellen P. Vail were properly filed. Cooper's Equity Pleading.

The pleadings under the cross-bill of Arkell and Mrs. Drexel are very similar to those found on the common law side of the court in the old case known as "Shelly's case," where Henry Shelly, claiming a covenant broken in the lease, entered *vi et armis* and disseized and ejected one Nicholas Wolfe, the lessee, who sued him in trespass *quare clausum fregit*. Notwithstanding he was his landlord, the court stopped to inquire as to the title of Henry Shelly, before inquiring into the merits of the cause, whether any condition of the lease had been broken. 1 Coke, 87 b—88 ab.; Fraser, Ed. 219.

The decree entered in the Circuit Court being inequitable, and assailable, and Arkell and Mrs. Drexel having filed their cross-bill against Ellen P. Vail, she can in this cause maintain her cross-bill and attack said decree. Loyd v. Kirkwood, 112 Ill. 329.

Mr. Arkell and Drexels having filed a cross-bill, claiming title and asking affirmative relief, which may adversely affect Mrs. Vail's title, the court will, upon a cross-bill filed by Mrs. Vail defensive of her title, look into the foreclosure proceedings under which Drexels' title is derived as against Mrs. Vail, to see whether it is just and equitable that they shall have such relief; the court will not lend itself to technical estoppels, but will grant to a complainant in an original or cross-bill only what in equity and conscience he ought to have. Wadhams v. Gay, 73 Ill. 415; Bean v. Smith, 2 Mason, 252; Hamilton v. Houghton, 2 Bligh (P. C.), 169.

Arkell and Mrs. Drexel have alleged against Mrs. Vail an

estate in fee simple, although to obtain affirmative relief as against Miller, it need not have been alleged to that extent; yet as Mrs. Vail was made a party to the cross-bill of Arkell and Mrs. Drexel, under a pretense of adverse title, she may set up in her answer as at common law a general traverse of title or estate to the extent of which it is alleged. Stephen on Pleading, 240, and authorities there cited.

Messrs. HUTCHINSON & LUFF, for appellees.

The matters set forth in the cross-bill are new and distinct from the matters embraced in the original bill and not germane thereto, and the demurrer was properly sustained. The cross-bill seeks no relief against the complainant in the original bill. Daniell's Ch. Pl. and Pr. 1548; Daniel v. Morrison, 6 Dana, 186; Slason v. Wright, 14 Vt. 208; Kennedy v. Kennedy, 66 Ill. 190; Gage v. Mayer, 117 Ill. 636.

The cross-bill is barred by *laches* and lapse of time, more than seven years having elapsed since the decree and sale complained of and no excuse for the delay being shown. Fergus v. Woodworth, 44 Ill. 374; Hay v. Baugh, 77 Ill. 500; Bush v. Sherman, 80 Ill. 160; Hoyt v. Pawtucket Inst. for Savings, 110 Ill. 390, and cases cited.

A bill of review must be filed within the time allowed by statute for the suing out of a writ of error. Sloan v. Sloan, 102 Ill. 581.

The matters contained in the cross-bill are *res adjudicata*.

The decree of July 14, 1882, was final, in that it settled all the equities between the parties, and left nothing to be done but to execute the decree. The amendment was made by consent; it was purely formal, made no change in the equities of the parties, and was in the interest of the defendants. Black on Judgments, Secs. 41, 43, 154, 155, 156, 157, 161.

WATERMAN, P. J. A cross-bill is defined by Story in his work on Equity Pleadings, Sec. 389, to be "a bill brought by a defendant in the suit against the plaintiff in the same suit, or against other defendants in the same suit, or against both, touching the matter in question in the original bill."

It is quite manifest that the cross-bill of Ellen P. Vail is not touching the matters in question in the original bill of Annie M. Miller; that bill is based entirely upon the charge that she, Annie Miller, has a lease, with rent paid up for twenty years, to certain premises; and is therefore entitled to be neither harassed nor disturbed by the executors of Joseph W. Drexel, by whom it is alleged the lease was made. Nor is the cross-bill of Ellen P. Vail touching any of the matters in question in the cross-bill filed by the executors of Joseph Drexel. That bill is based upon the allegation that they are owners of certain premises and that Annie Miller and Alexander Miller are interfering with their use and enjoyment of the same, and have committed, and threaten to commit, divers trespasses, etc. Ellen P. Vail having been made a party to the original bill and to the cross-bill without any allegation showing why she should be a party, as neither bill showed any ground of relief against her, and neither asked for any, she could have successfully demurred to each of these bills. *Kennedy v. Kennedy*, 66 Ill. 190-195.

Nor was she, as is urged, ordered to answer the cross-bill; she was ruled to plead, answer or demur to the same. The matters set up in the cross-bill of appellant are in no respect germane to those of the original bill or cross-bill of Drexel and Arkell.

Appellant alleges that the Circuit Court disregarded the order of the Appellate Court, and rendered a decree in violation of such order. If this is so, such action upon the part of the Circuit Court was error, but its decree was not therefore void; if the Circuit Court rendered a decree variant from that directed by the Appellate Court, appellant might then have appealed from that decree or sued out a writ of error; instead of this she allows nearly eight years to elapse ere she complains of this decree, which she now says was unauthorized and void. More than seven years have elapsed since the sale took place under this decree, during all of which time she has been inexcusably silent. Nothing is alleged which, during all this time, she has not known. One guilty of such *laches* is not favorably regarded by a court of equity. *Munn*

Cole v. National School Furnishing Co.

v. Burgess, 70 Ill. 604; May v. Baugh, 77 Ill. 500; Bush v. Sherman, 80 Ill. 160; Hoyt v. Pawtucket Inst. for Savings, 110 Ill. 390; Hamilton v. Lubukee, 51 Ill. 415; Dempster v. West, 69 Ill. 613.

Appellant charges that the master began the publication of notice of the sale by him made, prior to the expiration of the time fixed for payment by the defendants of the sum found due. The decree was entered July 14, 1883—the first publication of notice of sale was October 13, 1883.

Appellant, however, contends that as the decree was amended on the 9th day of October, 1883, the thirty days began to run from that time. The amendment, it appears, was made by stipulation of the parties, of whom appellant was one, and was purely formal, being merely to correct certain clerical errors. The decree remained a judgment as of the date of its entry, July 14, 1883. Black on Judgments, Sec. 154; Coughran v. Gutcheus, 18 Ill. 390; Smith v. Wilson, 26 Ill. 186.

The allegation that the master has never made to Joseph W. Drexel, his heirs, executors or assigns, any valid conveyance of the premises, is a mere conclusion of the pleader. What conveyance he has made so that the court can determine as to its validity, is not shown.

The demurrer to appellant's cross-bill was properly sustained, and the decree dismissing the same is affirmed.

Decree affirmed.

WILLIAM O. COLE ET AL.

V.

NATIONAL SCHOOL FURNISHING CO.

Sales—Warranty—School Bonds.

In a controversy touching the sale of certain school bonds which were forged, this court holds, in view of the evidence, that the plaintiffs are entitled to a judgment in a sum named.

[Opinion filed December 7, 1891.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. BALL, WOOD & OAKLEY, for appellants.

Messrs. OSBORNE BROS. & BERGETT, for appellee.

MORAN, J. This case was in this court at the October term, 1888, (30 Ill. App. 156,) and a judgment in favor of the present appellants was then reversed for the reason that we thought the conclusion of the trial court was not sustained by the evidence as then shown in the record. There is, in this record, further evidence showing more clearly what the relations of appellants and appellee in the bond transactions were, and we do not regard our view of the case when here before as controlling on the record now presented.

It is shown that appellee received from appellants \$82.50 of the money which appellants paid for the \$700 of bonds. This was to pay for a supposed order for school furniture which accompanied the notice that the bonds were at the express office.

The school furniture order appears to have been a part of the scheme of fraud perpetrated by the forgers of the bonds. If the appellee had no responsibility for the fraud perpetrated on appellants, it certainly received from appellants \$82.50 of the money that they were defrauded of, for which it has not rendered to appellants or any one else any value or consideration.

This is the money of appellants in appellee's hands, and which appellants have a right to recover in this action. Whatever view may be taken of the other questions in the case, the verdict should have been in favor of the appellants for said amount. The judgment must therefore be reversed and the verdict in favor of appellee set aside and a new trial granted.

Reversed and remanded.

Dixon National Bank v. Spielman.

DIXON NATIONAL BANK

V.

JACOB SPIELMAN.

Negotiable Instruments—Notes—Partnership—Dissolution — Evidence of.

1. The evidence in the case at bar was insufficient to justify a finding that appellant bank had notice of the dissolution of appellee's firm prior to the executing of the notes sued on.

2. Upon rehearing this court holds that notice that as between a person named and the defendant the latter had become but a surety, was as effectual to preclude the former from pledging the credit of the defendant as notice of the dissolution, if received, would have been, and that the judgment for the defendant must be affirmed.

[Opinion filed January 14, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. BALL, WOOD & OAKLEY, for appellant.

Messrs. HOFHEIMER & ZEISLER, for appellee.

GARY, J. In 1870 or 1871, a firm called Spielman, Dement & Pischel was formed at Dixon, Illinois, but in 1874 or 1875, it ceased to do any other business than renew its bills payable as they fell due.

Their business had been manufacturing, and from 1874 or 1875 their works had been operated by a creditor, the father of Dement. On the 1st of September, 1877, a paper under seal was executed between them by which Spielman and Pischel conveyed to Dement all their interest in property described, which, probably, though not so expressed, was the manufacturing plant. Dement gave his notes to Spielman for a large amount and covenanted with Spielman and Pischel to assume the payment of, and save Spielman and Pischel harmless from, all debts of "the late firm of Spielman, Dement & Pischel."

By another paper under seal between Spielman and Dement there was shown a like conveyance by Spielman alone, and Dement agreed with Spielman to pay all outstanding obligations of Spielman, Dement & Pischel, "and the copartnership is hereby dissolved." This suit is by the bank against Spielman only, upon two notes made by Dement in the name of Spielman, Dement & Pischel, dated March 2, 1878, but not delivered until three weeks later, in renewal of other notes of the firm held by the bank and past due.

As the case stands, the only question is one of fact—did the bank have notice of the dissolution of the firm before accepting these notes? Besides the inference that the jury might draw from the facts that Dixon is not a large city and that the firm had not been manufacturing for several years, and that therefore the bank must have known that the firm was out of business, and so were at least put upon inquiry as to Dement's authority to use the firm name, the only evidence of notice of the dissolution to the bank is the testimony of Dement. He was a witness at the trial for the bank, and the appellee read from a deposition he had given earlier. In the deposition he had said that there was never any public announcement of the dissolution; that the bank understood the whole situation; knew of the dissolution, and that he knows that from his conversation with them, explaining the whole situation and telling them the substance of the agreement between Spielman and himself. He did not recollect any particular conversation, or which officer of the bank it was with. On the trial he testified that he did not show to the bank the agreement between Spielman and himself, and that he himself did not consider the firm dissolved. The bank officers deny notice.

Dement does not remember with whom he talked nor what was said, from which he draws the conclusion that the bank understood the whole situation. In *Hawkins v. Harding*, 37 Ill. App. 564, the character of that kind of testimony as evidence, is commented upon, and its insufficiency shown. The inference to be drawn from the size of Dixon, and the cessation of business by the firm, is just as strong for the three or

four years when such inference would have been untrue, as for the six months, when it would have been true. The circumstances did not put the bank on notice of a fact, namely, the dissolution, which was no fact. And when the fact became a fact, there was no change in the circumstances.

As was decided when the case was here before, the burden was on the appellee to show notice. 35 Ill. App. 184. The evidence of notice can be called such only because the testimony of Dement is in the case without objection. His impressions now, as to the conclusions to be drawn from conversations a dozen years before he testified, if competent, are too weak evidence of such notice, and the judgment is reversed and the cause remanded.

Reversed and remanded.

[*Upon petition for rehearing, opinion filed March 19, 1892.*]

GARY, J. In the former opinion it was said, "as the case stands, the only question is one of fact: did the bank have notice of the dissolution before accepting these notes?" By the instructions to the jury, the defense below was put upon that ground; but if there be a theory upon which the evidence would justify the verdict, if that theory had been formulated in instructions, then the verdict must stand, if there be no error of law in the case. *McCormick Har. M. Co. v. Burandt*, 37 Ill. App. 165.

Now by the agreement between Dement and the appellee, as between themselves, Dement had become the principal in the debt to the bank and the appellee surety. *Chandler v. Higgins*, 109 Ill. 602; *Conwell v. McCowan*, 81 Ill. 285; *Brandt on Sur.*, Sec. 36. With notice of that relation the bank could no longer deal with Dement as authorized to bind the appellee.

This point was overlooked in the former opinion, only the dissolution of the firm as a fact, and notice of that dissolution, being kept in mind. It is part of the testimony of Dement, not before alluded to (except the last two lines), that when the notes were given, he told the cashier of the bank that he had agreed

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to take up all these notes (meaning notes of the firm) that he could, asked the cashier to permit him to give his individual notes for the firm notes, and stated to the cashier the substance of the agreement between himself and the appellee.

We do not regard it as important that this testimony of Dement was in answer to questions on behalf of the bank when Dement's deposition was taken; it was read by the appellee to the jury. Nor that it is not denied by any testimony on behalf of the bank; such denial would only have made a conflict for the jury to settle. But if it be true, the notes in suit are not the notes of the appellee. We can no say that it is not true, though it would be more satisfactory if more specific. The notes for which these were given in renewal, were counted upon in additional counts filed January 25, 1889. To them the limitation of ten years was pleaded, and is a bar.

In the former opinion wherever notice is mentioned, notice of the dissolution of the firm was meant, but notice that as between Dement and the appellee, the latter had become but a surety, was as effectual to preclude Dement from pledging the credit of the appellee, as notice of the dissolution, if received, would have been. The judgment must be affirmed.

Judgment affirmed.

CHICAGO & AURORA SMELTING & REFINING COMPANY

V.

DANIEL COLLINS.

Master and Serrant—Duty of Employer to Keep Premises in Safe Condition, Extent of—Personal Injuries—Stranger.

The owner of a manufacturing plant is under no obligation to make all parts of the premises safe for a stranger to them to ramble through in the night, even if such person was at work for the owner in a part of the premises where there was no danger.

[Opinion filed January 14, 1892.]

Chicago & Aurora Smelting & Refining Co. v. Collins.

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Messrs. WALKER & EDDY, for appellant.

Mr. EDWARD MAHER, for appellee.

GARY, J. The first dozen lines of the opinion in Goss & Phillips Mfg. Co. v. Suelau, 35 Ill. App. 103, are applicable to this case.

The appellant is a corporation having two separate plants in one group of buildings, for smelting and refining lead. Each plant consisted of three kettles—one about seven feet in diameter, the top of which is about two feet above the floor; another something smaller and lower; and a third much smaller and on a level with the floor. The appellee was employed by the corporation, working nights, but his labor did not call him to the immediate vicinity of the kettles, though on the night before his injury he was engaged in wheeling bullion past one of the plants, within forty feet, more or less, of the kettles, and saw men with torches working around the kettles. On the fourth night of his employment he was set at work in a lead pit, from which access to that plant could be had by going up some steps and stepping over a trench or bin for holding coal to the floor where the kettles were. He had left his lunch at some other part of the premises, and in the night, wanting it, and having seen others go up those steps, he took that, to him, unknown route to the place where he had left it. In so doing he walked into the molten lead in the smallest kettle of the plant, sustaining very severe and probably permanent injury, and suffering prolonged and excruciating pain. For that injury he sues, grounding his action on a supposed neglect of duty of the appellant to keep premises reasonably safe, or warn employes of the danger. Whether the declaration shows sufficiently the facts from which any such duty toward the appellant arose, is not a question on this record, no motion in arrest nor assignment of error raising it. Many cases on this subject are collected in 2

Thompson on Neg. 1244. But the question whether, upon the facts in evidence, there was such a duty, is before us. The appellee was not sent by the appellant to the place where the kettles were, nor put at any work that would take him near them. The most that can be said is, that, being employed in the works, he had an implied license to go, and was not a trespasser in going where his duty did not call him, taking an unknown route on an errand of his own. To such facts the principle and authorities upon which *Gibson, Parish & Co. v. Sziepienski*, 37 Ill. App. 601, was decided, apply. The appellant was under no duty to make all parts of its premises safe for a stranger to them to ramble through in the night, even if he was at work for it in a part where there was no danger.

It is assigned for error that the court refused to instruct the jury to find for the defendant, and also that a new trial was denied.

Both assignments are sustained, the judgment reversed and the cause remanded.

Reversed and remanded.

43	480
142	612

43	480
51	441

43	480
68	616

CITY OF CHICAGO

V.

JOHANNA LESETH.

Municipal Corporations—Negligence of—Personal Injuries—Damages.

1. Trial judges should exercise their powers to cut down excessive verdicts in personal injury cases.
2. This court declines to interfere with a judgment for \$15,000 in the case presented.

[Opinion filed January 14, 1892.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding.

Messrs. JACOB J. KERN and E. S. BORTUM, for appellant.

Messrs. STORY, WESTOVER & STORY, for appellee.

MORAN, J. This appeal is prosecuted from a judgment against the city for an injury received by appellee by stepping into a hole in the sidewalk.

We have fully considered all the points made by the counsel for appellant, some of which are strenuously and ingeniously pressed, but we are not able to say that any error was made upon the trial, either in admitting or excluding evidence or in instructing the jury. The evidence fully sustains the verdict so far as the appellant's liability is concerned, and yet we affirm the judgment with reluctance on account of the amount thereof.

The jury returned a verdict for \$20,000, from which the court required that \$5,000 should be remitted, and rendered a judgment for \$15,000 against appellant. The injury is indeed shown to be serious; a displacement of the womb, causing an interruption of the natural functions, and constant inflammation and pain, from which the physician testifies she can not get well except by a dangerous operation, and possibly not by that. Nevertheless, the judgment is very large.

There is a noticeable tendency to large verdicts in injury cases in this county within the last three or four years, which should be checked, and judgments kept within moderate limits. Large damages in such cases are the result of the sympathy which judges and jurors, in common with the majority of men, feel with the pain and suffering of the victims of such accidents. The limit of compensation for any actual pecuniary loss, such as loss of time, deprivation of ability to earn a livelihood, and necessary expenses incurred, is greatly exceeded, in a vain attempt to measure pain and suffering, and balance it by a reward in money. Here the field of absolute conjecture is entered, and with no rule to guide the judgment, the verdict is reached by pure and very frequently by most generous guessing.

The tendency to gross verdicts is such that if it does not receive a check, the bankruptcy of corporations liable in this class of cases must follow. The majority of the court are of

opinion that the judgment is not so excessive as to compel reversal of the trial judge, and the judgment must therefore be affirmed.

I think the judgment is too large, and that the excessive verdicts must find resistance somewhere. The trial judges should exercise their powers to cut them down within reasonable limits. It is their province to deal with such questions, and they can do so with more intelligence than a reviewing court.

Judgment affirmed.

EDWIN H. BROWN

V.

GEORGE A. GARY ET AL.

Garnishment—Intervening Petition—Power of Court over Parties.

- In a garnishment proceeding, where the fund constituting the subject-matter of the litigation has, without authority, passed into the custody of a court of another State, the court has the power to order an intervening petitioner to sign a stipulation agreeing that the fund in question be restored to a receiver of the court, and upon the refusal of the interpellant to sign such stipulation, may properly strike his petition from the files.

[Opinion filed January 14, 1892.]

IN ERROR to the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

On February 16, 1888, E. A. Barnes began garnishment proceedings in the Superior Court of Cook County against George A. Gary, garnishee, on a judgment which he had obtained by confession against Margaret Austin and P. L. Austin, upon the same day. The garnishee, George A. Gary, filed an answer stating that he held, among other things, a note for \$806.71 signed by one James Maguire and secured

by mortgage on real estate in Tuscola county, Michigan; that said note was payable to the order of and belonging to the said Margaret Austin, the same being held to secure the payment of \$200 by said Margaret Austin to said E. A. Barnes. The garnishee further claimed a lien on said note for professional services by him rendered to said Margaret Austin, this lien subject, however, to said claim of Barnes thereon. After said answer, more than a year elapsed before anything further was done in said suit. On April 13, 1889, Edwin H. Brown appeared and filed an intervening petition, alleging that the Maguire note held by the garnishee had been assigned to him prior to the beginning of said garnishment proceeding. He afterward filed pleas denying that there was any record of the supposed judgment set up in the affidavit of Gary for garnishment, and also alleged that the Superior Court had not, in rendering the said judgment, jurisdiction of either the subject thereof or the persons against whom it was entered. He then moved for an order appointing a receiver to take charge of all the property which the garnishee had. Such an order was entered, Charles J. Ford was appointed receiver, and the garnishee was directed to and did turn over said note and mortgage, but prayed an appeal from said order to the Appellate Court, which court on hearing affirmed the order. Gary v. Brown, 33 Ill. App. 435.

On October 7, 1889, Edwin H. Brown filed a motion in this cause for leave to begin foreclosure proceedings on said Maguire note and mortgage in the Circuit Court of Tuscola County, Michigan, and asked leave to make the receiver a party to such foreclosure suit, in order that the money derived from such foreclosure proceeding might be paid into the hands of said receiver. In support of his motion said Brown filed an affidavit of his counsel, William T. Blair, which contained, among other things, the following:

“That said Brown is willing and offers to bear the expense and charge of such foreclosure for the purpose of protecting his interest in the said note and mortgage; that said receiver ought also to be made a party to such suit, and ought, in fact, to be a party complainant therein, for the reason that he is

the only person entitled to recover and collect the money due under and by virtue of the said note and mortgage, from whatsoever source the same may come."

The said Brown agreed to employ an attorney at his own expense to conduct such foreclosure suit, and to act as attorney for the receiver. The court, on hearing said motion, entered an order allowing the bringing of such suit and permitting the receiver to be made a party to such foreclosure proceedings.

Thereupon, in the names of said Brown and said receiver, there was prepared and filed in said Michigan court a bill for the foreclosure of said mortgage, said E. A. Barnes, George A. Gary and said Margaret Austin, with others, being made defendants thereto; said bill prayed not only for the foreclosure of said mortgage and collection of said note, but also that the rights and claims of the said several defendants might in that tribunal be heard and adjudicated, and that said defendants might be required to present their said claims thereto for such adjudication. One J. N. Huston, the solicitor for the complainants in said bill, contrary to the express order of the receiver, surrendered to said Maguire said note and a release of said mortgage from and by said receiver to said Maguire theretofore executed by said receiver, and consented that such funds be paid into and retained in the Michigan court. Thereupon said Michigan court entered a decree distributing such funds in part and holding the remainder of the same until the Superior Court of Cook County should determine to whom they belonged, and all other parties were dismissed from said Michigan court except said receiver, Barnes, Gary and appellant. Barnes thereupon, in the Superior Court of Cook County, moved the court for an order directing the garnishee and the said interpellant, Edwin H. Brown, to join with him in a stipulation consenting that the funds in the hands of the court in Michigan might be paid over to the receiver of the said Superior Court, to be held by him until the court should determine the rights of the parties in interest. Whereupon the Superior Court ordered him to join with Gary and Barnes in the following stipulation:

Brown v. Gary.

“State of Illinois. In the Superior Court of Cook County, October Term, A. D. 1890. Gen. No. 114,722.

Margaret Austin and P. L. Austin, for the use of E. A. Barnes,	}	Garnishment.
vs.		
Geo. A. Gary, Garnishee. Edwin H. Brown, Interpellant.		

Charles J. Ford, receiver, by appointment of court. It is hereby stipulated and agreed by and between the above named E. A. Barnes of the first part, and Geo. A. Gary of the second part, and the said Edwin H. Brown, interpellant, of the third part, that the balance of the proceeds of the James Maguire note and mortgage heretofore placed in the hands of said Charles J. Ford, receiver, in the above entitled cause, and which said proceeds are now in the custody and control of the Circuit Court of Tuscola County, Michigan, may be paid forthwith into the hands of said Ford, receiver as aforesaid, after deducting from the entire proceeds of said securities the fees and charges of the register of said Circuit Court and any other fees and charges for which said proceeds may be liable, and also the sums and costs heretofore awarded out of said proceeds by said court to said Barnes and said Gary respectively. The said balance so paid into the hands of said Ford, receiver, to be held by him to await the final determination of the rights therein of the respective parties hereto and without prejudice to the rights of any of the parties hereto.”

The garnishee signed the same; but the said interpellant, Edwin H. Brown, refused to sign any such stipulation and refused to comply with the order of the court requiring him to do so; thereupon the court dismissed his interpleader and struck the affidavit of his counsel filed in support thereof from the files. From which order dismissing his interpleader and striking the affidavit of his counsel from the files, the said Brown appealed.

Mr. WILLIAM T. BLAIR, for plaintiff in error.

Mr. JOHN W. LANEHART, for defendant in error, Barnes.

WATERMAN, P. J. As the case stood when this order was made, the Superior Court had lost control over the fund which it had once had in its custody.

Barnes, Gary, and the appellant Brown, had each been before the court asserting a right to all or some portion of the fund.

In some way, as was asserted, without the consent of any of the parties, the Maguire note and mortgage had been surrendered, and the money received thereon had been paid into a court of the State of Michigan. It appeared that after disposing of the principal portion of the fund, the Michigan court had held the remainder with a view to ordering it paid as the Superior Court of Cook County might determine the rights of the parties to be; but all power of the Superior Court to enforce any order it might make as to a final disposition of the fund, was gone; the Circuit Court of Tuscola County in the State of Michigan, might or might not abide by the conclusions of the Superior Court of Cook County, State of Illinois. All parties had so submitted themselves to the jurisdiction of the Circuit Court of Tuscola County, that it had power to make a final determination of their rights to, and finally dispose of, the fund. To be sure, it had not done so, perhaps out of courtesy, and perhaps because it had not been asked, but its power in the premises was undoubted and undisputed.

The Superior Court, therefore, very properly felt that if it was to go on and adjudicate as to the right of the respective claimants of this fund, it ought to be placed in a position where it could enforce its judgment and not merely be able to advise a foreign tribunal. The Circuit Court of Tuscola County was evidently willing that the final determination as to this fund should be made by the Superior Court of Cook County, and the latter tribunal rightfully thought that the parties before it, claiming this fund, ought, as they were each asking its aid, to be willing to put the subject-matter of the litigation into its hands; place the Superior Court in a position where its decree could be enforced, and not ask it to merely sit for the purpose of giving advice which might or

Brown v. Gary.

might not be followed. To this end it, therefore, required that each of the parties should stipulate that the fund might be taken from the Circuit Court of Tuscola County in the State of Michigan and placed in the hands of the receiver of the Superior Court.

It is urged that the appellant Brown properly declined to join in such stipulation, because it was thereby sought to get the fund into the hands of a person hostile to his interests. This objection proceeds upon an entirely erroneous view of the position occupied by a receiver. A receiver is neither hostile nor friendly to any party to the cause in which he is appointed. He is but the arm, the steward of the court; his possession is its possession, and it is a gross and shameful abuse of his trust for him to make use of his place for one party at the expense of another. His duty is to protect the fund against all and to distribute it as ordered by the court. In its division among the parties he has, and can properly have, no possible interest. Had the fund or what remained of it again come into the hands of the receiver, he would have held it for appellant as much as for Gary or Barnes, and would have been instantly removed had he been found to be using his position to assist them in their litigation with appellant. The stipulation could do no harm to appellant unless he had in mind to keep the fund out of the control of the Superior Court, and if its judgment should be against him, then apply to the court in Michigan to, notwithstanding such judgment, retain the fund and distribute it as it deemed best; thus giving to appellant an opportunity to litigate the matter over in Michigan after he had been defeated in Illinois.

It is urged that the Austins, the judgment debtors, could not have recovered against Gary, the garnishee, and that therefore Barnes, the judgment creditor, can not. No such question is involved in this appeal.

The order dismissing appellant's interpleader was not an adjudication of the right of Barnes to the fund; it was merely a decision by the court that it would not hear a claimant who refused to permit the fund to be restored to the custody of the court so that it might have power to enforce its judgment.

Nor did the order determine as to the validity of the assignment to appellant or as to the rights he acquired under it, or as to the standing of the judgment upon which the garnishee proceedings were based. Any and all questions arising in the case under the pleas and interpleader of appellant would have remained had he joined in the stipulation; indeed, the stipulation itself recites that the money is to be paid into the hands of the receiver without prejudice to the rights of any of the parties.

There can be no question as to the power of the court to make the order. *Gary v. Brown*, 33 Ill. App. 435; *The Republic of Liberia v. Royce*, 1 App. Cases, 139.

The order of the Superior Court is affirmed.

Order affirmed.

PHILLEMONT L. AUSTIN

V.

MARGARET AUSTIN ET AL., FOR USE, ETC.

Judgments and Decrees—Jurisdiction of Court—Presumption in Favor of—Intervening Petition, Dismissed for Want of Evidence—Practice.

1. Where a court of superior general jurisdiction has proceeded to adjudicate and to decree in a matter before it, all reasonable intendment will be indulged in favor of its jurisdiction.

2. Where an intervening petition has been properly dismissed the intervening petitioner can not question the correctness of the distribution of the fund in controversy between the parties to the proceeding.

[Opinion filed January 14, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

On February 16, 1888, E. A. Barnes obtained judgment in the Superior Court against Margaret Austin and P. L. Austin for \$259.39; the judgment being by confession upon

Austin v. Austin.

a note dated December 7, 1887, for \$800, payable four months after date, with a warrant of attorney authorizing any attorney to appear at any time thereafter and confess a judgment for such amount as might appear to be due and unpaid thereon. Upon the same day said Barnes began garnishee proceedings in the same court against George A. Gary. Gary filed an answer, stating that he held a note for \$806.71, signed by one James McGuire, and secured by mortgage on real estate in Tuscola county, Michigan; that said note was payable to the order of and belonged to the said Margaret Austin, and that he, Gary, had a lien thereon to secure the payment of \$527.25 owing by said Margaret Austin to him for services by him rendered for her, and that said Barnes had a lien of \$200 on said note.

On April¹ 13, 1889, Edwin H. Brown appeared and filed an intervening petition, alleging that the McGuire note held by the garnishee had been assigned to him prior to the beginning of the garnishment proceedings. Upon his motion, Charles J. Ford was appointed receiver of said note and mortgage. On October 7, 1889, Brown filed a motion for leave to begin foreclosure proceedings on said McGuire note and mortgage in the Circuit Court of Tuscola County, Michigan, and asked leave to make the receiver a party to such foreclosure suit. The court entered an order, allowing the bringing of such suit and the making of the receiver a party thereto. Thereupon, in the names of said Brown and said receiver, a bill for the foreclosure of said mortgage was filed in the Circuit Court of Tuscola County in the State of Michigan; said Barnes, Gary and Margaret Austin, with others, being made parties defendant thereto.

Under such proceeding in the Circuit Court of Tuscola County, Michigan, the money due on said note and mortgage was paid into that court, and that court thereby acquired jurisdiction to dispose of such fund among the parties to that suit as it should see fit. All the parties to the proceeding in the Superior Court disclaimed ever having intended that the fund should thus have passed beyond the control of the Superior Court.

The Circuit Court of Tuscola County, Michigan, after distributing a portion of the fund, directed that the remainder should be held until the final determination of the garnishee proceedings in said Superior Court of Cook County, and all parties were dismissed from said Michigan Court except said receiver, said Barnes, Gary and Brown.

Said Brown having, after the decree of the Circuit Court of Tuscola County, Michigan, refused to comply with an order of the Superior Court, that all the parties before it claiming such fund and asking its assistance to obtain the same, should stipulate that the money then held by the Michigan court be taken therefrom and deposited with Ford, the receiver of the Superior Court, the Superior Court, on the 28th of October, 1890, dismissed the interpleader of said Brown. Two days after such dismissal, appellant, who was one of the parties defendant in the judgment upon which the garnishee proceedings were based, appeared and filed a claim insisting that the McGuire note had been assigned to him about February 1, 1888, and that the judgment upon which the garnishee proceedings were based, was void because, as he insisted, the Superior Court had in entering said judgment, no jurisdiction over the parties against whom it was entered. The cause coming on to be heard, appellant offered no evidence in support of his claim, whereupon the court denied the same, and dismissed his interpleader, and ordered that out of the proceeds of said McGuire note then in the custody of the Circuit Court of Tuscola County, Michigan, when the said proceeds should be brought within the jurisdiction of the Superior Court, there should be paid to said Barnes the sum of \$310, and that the amount remaining after the payment to said Barnes, and the payment of certain costs, be delivered to the possession of said Gary; from which order appellant appealed.

Mr. WILLIAM T. BLAIR, for appellant.

Mr. JOHN W. LANEHART, for E. A. Barnes, appellee, and GEORGE A. GARY, *pro se*.

WATERMAN, P. J. More than eighteen months after the

entry of a judgment against him and the beginning of garnishee proceedings based thereon, but immediately after an order had been made dismissing the intervening petition of Edwin H. Brown, appellant appeared as an intervenor and claimed that the McGuire note and mortgage, the proceeds of which was then the subject of the controversy, had been assigned to him by the said Margaret Austin "at the date prior to the said supposed and alleged assignment to the said interpellant, Edwin H. Brown, to wit, on or about February 1, A. D. 1888;" said Phillemon L. Austin also in his intervening claim asserted that the Superior Court had no jurisdiction of the subject-matter of the suit because the Superior Court had no jurisdiction of the defendants in the judgment upon which the garnishee proceedings are based. The intervenor then proceeds as follows:

"Wherefore this interpellant says there is no record of any such judgment."

Appellant upon the hearing did not introduce any evidence to sustain his claim. The garnisheeing creditor, Barnes, introduced the record of the judgment against appellant and Margaret Austin, and thereupon appellant moved to dismiss the action for want of jurisdiction of the court, which motion was denied.

The warrant of attorney under which this judgment was confessed, authorized an entry of the appearance of the defendants at any time after the making of the power, and further authorized a confession of judgment for such amount as might appear to be due and unpaid. What did appear to be due and unpaid? If we look alone at the note, nothing was due, as it bears date December 7, 1887, is payable four months after date, and judgment was entered thereon on the 16th day of February, 1888; but the judgment was entered by leave of court, in term time; and it is therefore in the absence of anything appearing to the contrary, to be presumed that it was duly made to appear to the court that the sum for which judgment was entered was then due. This presumption finds support in the fact that upon this note for \$800, judgment was entered for only \$259.39. It was perfectly com-

petent for the makers of this note at any time after its execution to have agreed with its holder that it should become due in one or two months from its date. Where a court of superior general jurisdiction has proceeded to adjudicate and to decree in a matter before it, all reasonable intendments will be indulged in favor of its jurisdiction. *Osgood v. Blackmore*, 59 Ill. 261-266; *Martin v. Judd*, 60 Ill. 78-83; *Thomas v. Mueller*, 106 Ill. 36-44; *Black on Judgment*, Sec. 270; *Voorhes v. Jackson*, 10 Pet. 449.

In the case of *Osgood v. Blackmore*, *supra*, speaking of a judgment by confession, the court, after enunciating the principle above set forth, say:

“This being the presumption, then, the court being of general and superior jurisdiction, and being in session when this judgment was rendered, we must presume that the court first heard evidence that the requisite notice was given to render the note due and payable before the judgment was rendered.”

The judgment against the Austins was not void and can not be collaterally attacked. It is quite true, as is said by appellant, that the order of judgment made by the court in the garnishee proceeding is unique, but so were the circumstances under which the order was made. The only thing in the order which affected appellant was that which rejected and denied the claim by him set up. There being no evidence to sustain his claim, that portion was certainly proper; that portion of the order being sustained, it is quite immaterial to him what judgment the court gave as to the disposition of funds to which he has no right. The fund may never be brought within the jurisdiction of the court, and so Barnes may never get what the court has said shall be paid to him when the fund again comes within its control; why, however, should appellant object to the fact that there is an uncertainty about Barnes obtaining what the court has found belongs to him, Barnes? The order was, we think, proper under the statute, which authorizes the court to make all orders in regard to the subject-matter of the proceeding which may be necessary or equitable between the parties. Appellant having been rightfully found to have no claim to the fund, is in no

Swedish Lutheran Immanuel Church v. Nelson.

position to insist that the judgment against him and Margaret Austin is void.

Appellant did not and does not set up that the amount of said judgment was not then and is not now justly owing by him to said Barnes; how, then, is he injured by the appropriation of property belonging to his co-defendant to the payment of this just debt? Appellant made no pretense of establishing that he had any right to or interest in this property; it does not appear to have ever been in his custody or control; he has not been ordered to do anything; and the effect of all of which he complains is that the property of his co-defendant has, by a judgment from which she does not appeal, been taken to pay his, appellant's, honest debt.

Judgment affirmed.

SWEDISH LUTHERAN IMMANUEL CHURCH ET AL.

V.

MARIA NELSON.

Subrogation—Action Against Church and Parties “as Individuals and as Trustees”—Part Payment—Instructions.

1. In an action against a church for money loaned, where the evidence fairly presented a question of subrogation, this court holds that an instruction which ignored that question, was erroneous.

2. In the case presented it is *held*: The evidence raising a question whether, even if the plaintiff were entitled to recover, the church should not be credited for moneys collected and paid to the plaintiff by another defendant, that this question should have been included in an instruction to the jury purporting to give the law as to the amount of recovery, if any, to which the plaintiff was entitled.

[Opinion filed January 14, 1892.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Messrs. EDMUND FURTHMANN and JOSEPH H. FITCH, for appellants.

Messrs. DUPEE, JUDAH & WILLARD and N. N. CRONHOLM, for appellee.

GARY, J. On this record it can not be truly said that the merits are clearly with the appellee. The suit was commenced against the church and several individuals, among whom was C. Gibson, "as individuals and as trustees of said church," and so continued until after verdict, when, by amendment, the claim against the individuals "as individuals" was stricken out. Gibson was not served nor did he appear. It is pretty clear that the appellee twice lent \$100 to the church and received two notes, each for \$100, which she understood to be obligations of the church, signed by C. Gibson, who was then treasurer of it. She put in evidence his book as treasurer, showing that by his accounts, he reported to the church that she was a creditor of the church for those sums at the ends of the years 1879, 1880 and 1881, but the book indicated that she was paid December 27, 1882. It is not probable, however, that she was paid any money, unless for interest. The evidence rather indicates that on the 21st of November, 1881, she had some transactions with Gibson in which she surrendered the two \$100 notes, and received from him his individual note for \$450, and perhaps that she had also a note of \$100, whether a new one or one of the old ones is uncertain. She admitted collections from Gibson to the amount of \$338.50. The church defended upon the theory that if she had not been paid in money, she had accepted the individual obligations of Gibson in satisfaction of the church liability. Upon this state of the case the court gave this instruction:

"The jury are instructed that if they believe from the evidence that the defendants herein, or any one or more of them, became and were indebted to the plaintiff for sums of money loaned by the plaintiff to the defendants, or any one or more of them, at the instance and request of such defendants, and that such defendants have not repaid said sums of money or any of them, if they believe from the evidence money was so loaned, then the jury will find the issues for the plaintiff and assess her damages in such an amount as you may believe from

Story v. Springer.

the evidence that the defendants, or any one or more of them, received from the plaintiff, with interest at the rate of six per cent per annum from the dates that said sums were so received from the plaintiff."

Without criticising this instruction for abstract errors, not of practical importance, there are in it two that are of practical importance.

First: If the appellee had accepted Gibson as her debtor, by means of which he got credit in his accounts with the church, which was a question for the jury under the evidence, she ought not to recover from the church. Whether Gibson did get credit in his accounts is, as a matter of law, perhaps indifferent between these parties, but the equity of the defense is affected by that circumstance. If she accepted Gibson's note as satisfaction of the obligation of the church, it was not payment, and if pleaded, must be so, as accord and satisfaction. *Ulsch v. Muller*, 143 Mass. 379. No jury would understand under this instruction that the change of debtors was payment.

Second: There is a question, even if the church is the debtor, whether the appellee has not been paid on collections from Gibson considerable money which should be applied in adjusting the amount to be recovered, and the direction to assess the damages at the whole amount loaned with interest, if the borrower had not repaid any, was wrong.

The judgment is reversed and the cause remanded.

Reversed and remanded.

ALBERT G. STORY

V.

WARREN SPRINGER, IMPEADED, ETC.

Deed—Whether Intended as a Mortgage—Burden of Proof—Jurisdiction of Appellate Court—Freehold.

1. This court affirms the decision of the court below, holding that the

evidence in the case at bar was insufficient to establish that the deed in evidence was intended by the parties as security for a loan.

2. The decision of the Supreme Court in *Kirchoff v. Union M. L. Ins. Co.*, 128 Ill. 199, 133 Ill. 368, holding that an appeal in such case properly lies to this court, followed.

[Opinion filed January 14, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

Messrs. FAY & GRIGGS, for appellant.

Messrs. MILLER, STARR & LEMAN, for appellees.

GARY, J. In December, 1889, under instructions from James M. Allan, who, it may be assumed, was acting in the interest, and by the authority, of the appellant, and William T. Grower, who was the agent under parol authority of the appellee above named, James E. Monroe, attorney at law, prepared this paper :

“This agreement, made this fourteenth day of December, 1889, by and between Warren Springer, of the city of Chicago, Cook County, Illinois, party of the first part, and Eleanor A. Allan of the same place, party of the second part witnesseth as follows: Whereas the said party of the first part is the owner of the following lands in the said city of Chicago, to wit: Lots four (4), five (5) and six (6), except the north five feet of said lot four (4), in Sherman's subdivision of lots four (4) and five (5) and six (6), in block one (1) in Clark's addition to Chicago, with lot one (1) in block one (1), and the west half ($\frac{1}{2}$) of block two (2), in the Assessors' division of the southwest fractional quarter of section twenty-two (22) in township thirty-nine (39), north, range fourteen (14), east of the third (3rd) principal meridian, reference being hereby made to a map of said E. L. Sherman's subdivision, recorded on April 14th, 1855, in the recorder's office of Cook County, in book 85 of maps, at page 109.

“And whereas, the title to said land in said party of the first part is subject to the taxes and special assessments of 1889, and to unpaid water rents, and to a certain deed of trust dated October 8th, 1889, made by Albert G. Story and his wife, and said party of the second part and her husband, conveying said lands to Edwin F. Bayley, trustee, to secure four notes made by the grantors in said deed of trust, of even date therewith, for \$5,000 each, payable to the order of John Cochrane, on or before five years from date, with interest at the rate of six per cent per annum, payable semi-annually.

“Now therefore, it is agreed between the parties hereto, that in consideration of the sum of fifty dollars, this day paid by the said party of the second part to the said party of the first part, the said party of the first part shall and will, in case the said party of the second part shall, within six months from the date thereof, pay to the said party of the first part the full sum of seven thousand (\$7,000) dollars in addition to the aforesaid sum of fifty dollars, quit-claim, and release to the said party of the second part all interest in the above described lands expressly subject to all taxes, special assessments and water rents, now or at the time of such conveyance resting upon the said lands and to the said deed of trust and all of the principal and interest and other charges therein provided for.

“It is further agreed by and between the parties hereto that time shall be of the essence of this agreement and of all of the provisions thereof, and that in case the said party of the second part shall fail, from whatever cause, to pay to the said party of the first part the full sum of \$7,000 aforesaid, within the period of six months from the date of this agreement, then, and in such case, all the right and interest of the said party of the second part, under this agreement, and in and to said lands, and every part thereof, shall absolutely cease and determine without any demand or notice whatever, and without any return of the said sum of fifty dollars or any part thereof to said party of the second part.

“This agreement shall remain in the hands of James E. Monroe, of the city of Chicago, until performed within said period.

of six months, or until default made in the performance thereof by said party of the second part, and it shall not be recorded in any public office, and in case said party of the second part shall not pay said sum of \$7,000 within the time above limited, in that behalf, then this agreement shall be delivered by the said Monroe for cancellation to said party of the first part.

In witness thereof the said parties hereto have hereunto set their hands and seals the day and year first above written.

(Signed) ELLEANOR A. ALLAN, [Seal.]

(Signed) JAMES M. ALLAN. [Seal.]”

It is assumed that the name of Mrs. Allan was used to represent the interest of the appellant, and that the signing by James M. Allan was a blunder.

The appellee refused to sign it when it was presented to him. In fact, he had no interest in the property when the paper was prepared. It belonged to one Cochrane, with whom a contract for the purchase had been made upon which several thousand dollars had been paid, the benefit of which contract belonged then to the appellant.

A further installment was soon to become due upon it, in default of payment of which the contract would or could be forfeited. Mrs. Allan is a daughter of the appellant, and her husband was his agent.

Allan applied to the appellee for a loan to meet the installment. The result of the application, after much negotiation unnecessary to detail, was, that the appellee advanced \$3,750, of which \$3,030 went to Cochrane, and \$720 was used by Allan otherwise. As part of the transaction the title was vested in the appellee through deeds from Cochrane to appellant, and appellant to appellee. The controversy now is one of fact. Was that advance a loan, or one of obligation of the parties measured only by the words in that paper, assuming that the appellee was bound by it?

The object of the bill filed by appellant is to turn the latter deed into a mortgage. That upon sufficient proof that may be done, is such familiar law, that there is no controversy between the parties about it, and it would be mere parade to cite any of the numerous cases of this State alone. But the burden of proof is upon the party alleging a mortgage.

Illinois Paper Co. v. Northwestern National Bank.

Upon the conflicting evidence the court below has decided that it is not proved that the deed was security for a loan. We will not collate the evidence. We agree with the court below as to the result, and a review of the evidence would not profit anybody.

The bill is not framed with a view to any relief upon the language of the paper, so that the question is not before us as to the effect of the refusal of the appellee to sign it, a circumstance which seems not to have been known to the appellant, or any one in his interest, until it was divulged on the hearing of this case.

The appellee questions the jurisdiction of this appeal to this court, on the ground that a freehold is involved. It does not differ in that feature from the case of *Kirchoff v. Union M. L. Ins. Co.*, the appeal in which was dismissed by the Supreme Court in 128 Ill. 199, because it belonged here, and which was afterward decided by this court in 33 Ill. App. 607, and our decision affirmed by the Supreme Court in 133 Ill. 368. The decree is affirmed.

Decree affirmed.

THE ILLINOIS PAPER COMPANY

V.

THE NORTHWESTERN NATIONAL BANK.

Insolvency—Assignments—Preference of Creditors—Payment of Debt by Insolvent Prior to Assignment.

1. The mere fact of the payment of a debt by an insolvent, after he has determined to make an assignment, and who, thereafter, in pursuance of such determination, does assign, does not constitute a fraudulent preference which will be set aside.

2. It has uniformly been held in this State in respect to the statutes for the prevention of frauds and perjuries, that both debtor and creditor must have had an intent to hinder, defraud or delay creditors in order to bring the transaction within the purview of the statute.

[Opinion filed January 14, 1892.]

VOL. 43.] Illinois Paper Co. v. Northwestern National Bank.

APPEAL from the Circuit Court of Cook County; the Hon. LOREN C. COLLINS, Judge, presiding.

Appellant filed its bill against appellee, setting forth that it is a judgment creditor of one Charles N. Trivess, to the amount of over \$2,000; that execution has been issued upon the said judgment, and that said Trivess has no property or assets upon which the said execution can be levied; that the said Trivess on the 17th day of October, 1890, made a general assignment for the benefit of his creditors, under the statute of this State regulating such assignments; that while the said indebtedness to appellant was in full force, and while said Trivess was insolvent and after he had resolved, concluded and determined to make the said general assignment, he paid to appellee the sum of \$4,750 in payment of his note then held by appellee, but which note had not then matured or become payable, and which would not mature or become due or payable until the 30th day of October, 1890; and by said payment said Trivess paid his indebtedness to appellee in full, and thereby designed and intended to make and give to appellee, in fraud of the provisions of the statute, a preference; that by making such payment, the amount thereof was fraudulently withheld from coming to the hands of the assignee for distribution among the general creditors of said Trivess, as the law provides; that the assets and estate of the said Trivess that have come into possession of the assignee or within the jurisdiction of the County Court of Cook County under the said assignment, are wholly inadequate and insufficient to pay the *bona fide* indebtedness of said Trivess in full and are only sufficient to pay a small percentage of the same; and that by the said unlawful preference given to appellee, appellant, as a *bona fide* creditor of Trivess, was greatly defrauded.

The bill further states that the making of the assignment and the payment to appellee were parts of one transaction and constituted an assignment, with a preference to appellee, of the said sum of \$4,750, in violation of the prohibition of the statute aforesaid, and that the preference is void; and prays

that the payment to appellee be decreed a fraudulent preference and void, and that the same be subjected to the payment of the said indebtedness to appellant; that appellee be decreed to pay to appellant so much or such part of said indebtedness as it shall be entitled to after applying such percentage or dividend as the assets of said Trivess, under the jurisdiction of the County Court in the matter of the assignment, may produce, and for other and further relief.

Appellee filed a general demurrer to the bill, which demurrer the Circuit Court sustained, and dismissed the bill for want of equity.

Mr. MATTHEW P. BRADY, for appellant.

Mr. CHARLES M. STURGES, for appellee.

WATERMAN, P. J. The question presented in this case, is, whether the reception of payment by a creditor from an insolvent debtor, who, when he makes the payment has determined to make an assignment, and who, in pursuance of such determination does thereafter make an assignment, is such a preference, under the provisions of the insolvency law of this State, as that the payment will be set aside and the creditor be compelled to pay the money into court for the benefit of a creditor or creditors of the debtor; the creditor at the time of the payment to him receiving it in good faith, without knowledge or notice either that the debtor was insolvent or contemplated making an assignment.

True, the bill in this case sets forth that the notes paid were not due when payment was made, and that the debtor, the day after payment, made an assignment; but these allegations are immaterial, because it is not charged that the bank had even a suspicion of either the insolvency of its debtor or that he contemplated making an assignment. Had notice to the bank of the determination to make an assignment been charged, upon a hearing, the fact that the notes were paid before they were due, might have been material as tending to show such notice, and so also, if an answer denying the charges

of this bill had been filed, the limited time that elapsed between the payment and the assignment would have been material, as tending to show that the determination to assign existed when the payment was made; but as notice to the creditor is not charged, and the demurrer admits the determination to assign, neither the fact that the notes when paid were not due, nor the fact that an assignment was made the next day, is material.

The question remains as stated: Does the mere fact of payment of a debt by an insolvent when he has determined to make an assignment, and who thereafter, in pursuance of such determination, does assign, constitute a preference which will be set aside? If so, logically, it can make no difference that the determination to assign is not carried into effect for a year afterward.

Counsel for appellant quote at large from published opinions of the Supreme Court in *Preston v. Spaulding*, 120 Ill. 208; *Hide & Leather Nat'l Bk. v. Rehm*, 126 Ill. 461; and *Hanford Oil Co. v. First Nat'l Bk.*, 126 Ill. 584. It is sufficient to say in respect to the quotations from those cases, urged upon this court, as this court and the Supreme Court said in *Farwell v. Nilsson*, 133 Ill. 45, 35 Ill. App. 164, that "The language of an opinion is to be confined by the facts of the case which the court is considering." Each of the cases upon which appellant relies, was an instance in which the act held to be a fraudulent preference was not a payment, but was a giving of security or a placing of the creditor in a position which enabled him to obtain a preferential lien. The distinction between making a payment whereby an absolute title at once passes, and the creating of a mere lien, is pointed out in *Van Patten & Marks v. Burr*, 52 Iowa, 518, cited as *Van Patten v. Marks*, by the Supreme Court in *Preston v. Spaulding*, 120 Ill. 223.

Such cases are not authority for the contention of appellant in this case. The construction of the act concerning assignments for the benefit of creditors, insisted upon by appellant, is not in accordance with that placed upon the statutes of this State concerning fraudulent transfers. It has uniformly been

Gridley v. Bayless.

held in respect to the provisions of the statutes for the prevention of frauds and perjuries, that both parties must have had an intent to hinder, delay or defraud creditors, in order to bring the transaction within the purview of the statute. *Ewing v. Runkle*, 20 Ill. 448; *Hatch v. Jordon*, 74 Ill. 414; *Myers v. Kinzie*, 26 Ill. 36; *Hessing v. McCloskey*, 37 Ill. 341.

It is sought, as regards the statute regulating assignments, to change the salutary rule of the above mentioned cases and to punish a perfectly innocent party for a fraudulent act of another, of which he had no notice. The far-reaching consequences of the position assumed by appellant are obvious. If appellant apprehends the law correctly, no creditor is safe in treating as his own, money he has received in payment of debts, until time and circumstances have demonstrated that in paying him, his debtor had no intention of giving a preference, or then had not determined to make an assignment. We can not believe that the legislature in enacting this statute intended to bring within its scope, payments *bona fide* received, without notice by the creditor that his debtor contemplated making an assignment.

The decree of the Circuit Court dismissing the bill will be affirmed.

Decree affirmed.

GEORGE N. GRIDLEY

V.

T. H. BAYLESS.

Real Property—Contract for Sale of—Allegation of Breach—Action for Stipulated Damages—Parties.

A contract for the sale of realty, providing that in case of default, the defaulting party should pay to the broker of the other party the sum of \$100 as liquidated damages, this court holds, first, that before a broker could maintain his action for the sum specified, he must prove in addition to the default of the defendant that his principal had performed all that the contract required on his part, or that he was ready to perform, and, second, that the

action should have been brought in the name of the principal, the brokers not having been parties to the contract, which was under seal, although it contained a provision in their interest.

[Opinion filed January 14, 1892.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Messrs. COOK & UPTON, for appellant.

Messrs. DOOLITTLE, McKEY & TOLMAN and SAMUEL B. KING, for appellee.

MORAN, J. This action was brought by appellee against appellant to recover the sum of \$500, alleged to have become due to him by reason of appellant's failure to perform a certain contract with reference to the exchange of real estate. There was a finding and judgment in appellee's favor in the Circuit Court, and the case is brought here and elaborately argued on questions relating to the construction of the contract, whether it ever became operative between the parties to it, and which one was in fact guilty of the breach, if it did become operative. The contract was between Hubbard Parker of the first part, and appellant Gridley of the second part, and the clause under which appellee claims to recover is as follows:

"If either party hereto shall fail or refuse to carry out this contract, he shall forfeit to the other the sum of \$500, which shall be accepted as full and complete satisfaction as liquidated damages for such refusal to carry out this contract.

"This provision is made with the approval of the brokers, and if said Parker shall default, the \$500 to be paid by him shall go to W. A. Frye, broker for Gridley, and if Gridley shall default, the \$500 to go to Col. T. H. Bayless, broker for Parker, the parties not to be liable for commissions if this deal shall not be consummated."

A cause of action for the recovery of said sum of \$500 could only accrue to Bayless as against appellant by proof of

the existence of such facts and circumstances as would entitle Parker to maintain an action for breach of the contract, and before Parker could recover for a breach by Gridley, he would be bound to show that he had performed all that the contract required on his part, or that he was ready, willing and able to perform.

There was contention as to this point, and the court was asked by the defendant to hold, and refused to hold, the following proposition as law.]

“First proposition:

In order to hold the defendant liable, under the contract in question, to pay the five hundred dollars (\$500) forfeit as provided in the fifth clause of said contract, the said Hubbard Parker must have been able, ready and willing to have carried out said contract on his part at the time of the alleged pretended refusal of said defendant to carry out said contract on his part, and the burden of the proof is upon the plaintiff to prove that said Parker was so able, ready and willing; and in so proving the same he must show, by a preponderance of evidence, that the requisite fact existed, to have enabled said Parker to have maintained a bill against said defendant for the specific performance of said contract, or to have maintained a suit against him for damages for non-performance of the same.”

While this is a general proposition not stating the specific acts which Parker should be ready and willing to perform, still it states a correct rule, and the refusal of the court to hold it indicates that the finding in favor of appellee was upon some smaller measure of proof than is required by the proposition. The case presented is not one which warrants this court in sustaining a finding and judgment of the court below, based upon an incorrect view of the law. There is an objection to appellee's maintaining an action on this contract in his own name which seems to have escaped the attention of the parties and of the trial court, and which, as the case is to be sent back for new trial, we will point out. The contract is one under seal, and while it contains a provision for the benefit of Frye or of Bayless, as the refusal to perform the

contract might be by Parker or by Gridley, yet neither Frye nor Bayless is a party to the contract.

"The rule is, that a covenant can not be sued upon by the person for whose benefit it is made, if he is not a party to the deed, but the suit must be brought in the name of the person with whom the covenant is made." *Harms v. McCormick*, 132 Ill. 104, overruling *Dean v. Walker*, 107 Ill. 540.

Without passing on any of the questions made in the case except the refusal of the court to hold the proposition of law above set out, we reverse the case for that error, and remand it to the Circuit Court.

Reversed and remanded.

JACOB FREZINSKI, IMPLEADED, ETC.,

V.

DAVID L. NEWBORG ET AL.

Evidence—Conclusions of Witness, Improper.

In the case presented, this court holds, a witness for the plaintiff having been permitted, against the objections of defendant, to state his conclusions upon a material point, based upon what he had learned by investigation, that the admission thereof was improper.

[Opinion filed January 14, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

In this action it appeared that appellees, merchants in New York City, upon the strength of a written statement to R. G. Dun & Co., made by Abraham Frezinski, concerning the financial condition of what he in such statement called the firm of A. Frezinski, doing business at the town of Iron Mountain, in the State of Michigan, sold to said firm of A. Frezinski a bill of goods on thirty days' credit. Prior

Frezinski v. Newborg.

to the time for payment of this bill the firm (?) of A. Frezinski failed, and their goods were secretly sent to various parts of the country, some of them going to Chicago, where appellant, the father of Abraham Frezinski lived. Appellees brought suit against Abraham and Jacob Frezinski, alleging a fraudulent conspiracy on their part to obtain credit, also a fraudulent carrying away and secreting of the goods by them. The jury returned a verdict for the plaintiffs, specially finding that Jacob Frezinski was not a partner of Abraham Frezinski.

Messrs. HOFHEIMER & ZEISLER, for appellant.

Mr. ISRAEL COWEN, for appellees.

WATERMAN, P. J. Upon the trial a witness for the plaintiffs was permitted, despite the objections of the defendant, to give a great deal of hearsay testimony, and also to narrate his conclusions as to what had taken place. He was permitted to testify that he found on investigation that the goods were shipped to Jacob Frezinski in trunks; that he found where Jacob Frezinski had taken the goods by teams and had them in a house in Chicago under different names. There was no pretense that he saw any of these things or had any knowledge other than what had been told him, from which he had formed conclusions.

Such testimony ought not to have been received; it was most prejudicial to Jacob Frezinski, who was alone making a defense, and doubtless greatly influenced the jury. One of the plaintiffs was permitted to give his mere conclusions as reasons why he knew that the statement made to K. G. Dun & Co. was false. Experts are alone allowed to testify as to their conclusions. The instructions given for the plaintiffs are not free from fault but would alone hardly have misled the jury.

For the improper admission of testimony given by the witness Ettlesohn, the judgment is reversed and the cause remanded.

Reversed and remanded.

MILBURN WAGON COMPANY

V.

B. A. STEVENS.

Agency—Verdict for Defendant Ordered.

In an action based upon a contract entered into by an alleged agent of defendant it is *held*: That the jury were properly instructed to find for the defendant, no evidence having been introduced tending to establish the alleged agency.

[Opinion filed January 14, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding.

Mr. F. C. CALDWELL, for appellant.

Mr. J. O'B. SCOBEE, for appellee.

Per Curiam. Appellants as plaintiffs sought to recover from appellee the price of a certain wagon sold by one of appellant's agents to one Hall, who it is claimed purchased the wagon as agent of appellee. At the close of plaintiffs' evidence the court instructed the jury to find a verdict for defendant. It is not contended by appellant that said Hall was in fact authorized by appellee to purchase the wagon, or that appellee received the wagon, or in any manner ratified Hall's assumed authority. The contention is that Hall had been permitted by appellee to so conduct himself in connection with appellee's business as to clothe him with the authority which he assumed. We have examined the evidence carefully and we are unable to say that it has any tendency whatever to show that appellee ever gave Hall any authority or ever permitted him to so act as to induce a third person to believe that he had authority to make such a purchase as he assumed to make. Where there is no evidence tending to prove any element essential to plaintiff's cause of action, the court may direct a verdict for defendant.

There is no error and the judgment must be affirmed.

Judgment affirmed.

THIRTY-FIRST STREET BUILDING AND LOAN ASSOCIATION
V.
OSCAR D. WETHERELL, ASSIGNEE.

48 509
153s 361

Insolvency—Jurisdiction of County Court—By-law of Building and Loan Association—Stock Held by Insolvent—Set-off Against, of Debt Due from Insolvent to Corporation—Lien on Stock.

1. All the original jurisdiction that belongs in ordinary cases to all courts, belongs to and may be exercised by the County Courts in administering the assets of an insolvent.

2. A by-law of a building and loan association, providing that no share shall be transferred while any debt, penalty, or due of any kind against the owner thereof may remain unpaid, creates a lien upon the shares as against the shareholder, for a debt due by him to the association, and the assignee of an insolvent shareholder stands in the shareholder's shoes.

3. It therefore follows that, where a shareholder in a building and loan association was a banker, having funds of the association on deposit, that the assignee can not collect from the association the withdrawal value of the shares, leaving the association to share with the other creditors in a dividend for the amount of its deposit, but the association can offset against the assignee the amount due it as a depositor, against the withdrawal value of the shares.

[Opinion filed January 14, 1892.]

APPEAL from the County Court of Cook County; the Hon. FRANK SCALES, Judge, presiding.

Messrs. ALDRICH, PAYNE & WASHBURN, for appellant.

County Courts, in administering insolvent estates, act upon equitable principles, and afford relief such as a court of chancery might give. *Freydendall v. Baldwin*, 103 Ill. 325.

Courts of equity are peculiarly adapted to the administration of the law of set-off, and had adopted this equitable remedy as a rule of practice long before it received legislative sanction or became admissible in courts of law, and insolvency of one of the parties is the strongest incentive to the exercise of such equitable jurisdiction. *Hawkins v. Freeman*, 8 Viner's Abr. 560; *Chapman v. Derby*, 2 Vern. 117; C. D.

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& V. R. R. Co. v. Field, 86 Ill. 270; Brazelton v. Brooks, 2 Head (Tenn.), 194; Graves v. Hull, 27 Miss. 419.

Courts of equity follow the law in allowing or refusing set-offs qualified by the rule that special circumstances may control the equity. Hitchcock v. Rollo, Assignee, 3 Biss. 287; 2 Story's Eq. Jurisprudence, § 1437.

As to right of set-off against insolvent estates, see also Fennell v. Nesbit, 16 B. Monr. 351; In re VanAllen, 37 Barb. 225; Colt v. Brown, 12 Gray, 233; American Bank v. Wahl, 56 Me. 167.

Statutes of set-off are considered beneficial acts, and should be liberally construed. Burgess v. Tucker, 5 Johns. 105-107; Good v. Good, 5 Watts, 116-118; Chamboret v. Cagney, 10 Abb. N. S. 31-37; Thompson v. Congdon, 43 Vermont, 396-9; Temple v. Scott, 3 Minn. 419; Lindsay v. Jackson, 2 Paige, 581; Bradley v. Angel, 3 N. Y. 475; Myers v. Davis, 22 N. Y. 489; Jones v. Robinson, 26 Barb. 310.

Insolvency of one party is additional ground for allowance of set-off. Bonaud v. Sorrell, 21 Ga. 108; Gunn v. Scoville, 5 Day, 113; Story's Eq. Jur. 1434-5; Jordan v. Jordan, 12 Ga. 77-88; Carey v. Lewis, 24 Ind. 23; Gay v. Gay, 10 Paige, 369; White v. Wiggins, 32 Ala. 424; Hale v. Holmes, 8 Mich. 37; Field v. Oliver, 43 Mo. 200; Mackeham v. Crowe, 15 C. B. 847; Pond v. Smith, 4 Conn. 297; Simpson v. Hart, 14 Jos. 63; Howe v. Sheppard, 2 Sumner, 133; Decatur Ry. Co. v. Rhodes, 8 Ala. 206.

Messrs. E. L. BARBER and FLOWER, SMITH & MUSGRAVE, for appellee.

The right of set-off must be mutual. The relation between the parties must be that of debtor and creditor. If the debts sought to be set off accrued to the assignee, as such, after his appointment, they can not be set off as against a debt due from the assignor prior to the assignment. Scammon v. Kimball, 5 Biss. 443; Newhall v. Turney, 14 Ill. 341; Harding v. Shepard, 107 Ill. 264.

GARY, J. The appellee is the assignee in insolvency of Melville T. Roberts, who was a private banker conducting

business under the name of Thirty-first Street Bank, and the assets of Roberts are being administered under the direction of the County Court. The appellant is what its name imports; Roberts was its secretary and banker, and as a stockholder, held 665 of its shares. As a stockholder he held also a large number of other shares, pledged to the association as security for money loaned by it to Roberts.

The appellee demanded of the association an adjustment of the loan; a payment to him of \$771.55, being the surplus of the withdrawal value of the shares pledged, over the loan upon them; and of \$10,530.37, being the withdrawal value of the shares not pledged, denying the claim of the appellant to set off against the last mentioned sum the amount (\$10,325.90) which the association had on deposit with Roberts as a banker at the time he assigned, and claiming that for that deposit, the association must come in with other creditors for dividends only. Thereupon the association filed the petition for leave to pay the surplus of the withdrawal value of all the shares, pledged and unpledged, over what Roberts owed the association for both the lien and deposit, and an order upon the appellee upon such payment, to surrender all the shares to the appellant. The County Court denied the prayer of the petition, and this appeal is from that order.

The case now presents the singular feature that the appellant doubts, while the appellee affirms, the jurisdiction of the County Court over the subject-matter of the petition. The jurisdiction is clear. The shares were assets to be disposed of by the assignee, under the direction of the County Court. That court might have made the election for the assignee, compulsorily, whether he should take the withdrawal value of the shares held by Roberts, under section 6 of the Homestead Loan Association Act of 1879, or continue to pay the dues upon them until the maturity of the series to which they belong. We have already decided in a case where this appellee was a party that "all the original jurisdiction that belongs in ordinary cases to all courts, belongs to, and may be exercised by, the County Courts, in administering the assets of an insolvent." *Third S. M. E. Church v. Wetherell*, 43 Ill.

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App. 414; and see *Doran v. Hodson*, 43 Ill. App. 411, and *Atlas N. Bank v. Moore*, 40 Ill. App. 336.

If, instead of being the assets of an insolvent, administered in the County Court, the assets had been in the hands of a receiver, acting under the orders of a court of general equity powers, we assume that the power and jurisdiction of such a court to direct what the appellant asked, would be unquestioned, and that the only question would be whether granting what was thus asked would be a rightful exercise of such power and jurisdiction. The assignee had elected to turn the shares into money, and the decree appealed from impliedly ratifies that election. The effect of that election is to entitle the association to take up the shares upon such terms as may be equitable. The interest in the shares adverse to the association is in the assignee, in his character of assignee, and the association comes to the court controlling his action as assignee, to fix the terms of, and direct, the surrender of that interest. The question remains whether that association may deduct the deposit, as well as the loan, or the loan only, from the value of the shares. The statute authorizes such associations to adopt by-laws, and one of the by-laws of this is: "But no share shall be transferred while any debt, penalty or due of any kind against the owner thereof may remain unpaid." Such a by-law creates a lien upon the shares as against the shareholder for the debt. 2 *Morse on Banks*, Sec. 698; 1 *Morawetz on Corp.* Sec. 201. And the assignee stands in his shoes. *Ide v. Sayer*, 30 Ill. App. 210; 129 Ill. 230. So that any disposition which he could make of the shares, would be subject to the satisfaction of the debt for the deposit. Even without any such by-law, as the County Court administers the assets of insolvents upon principles of equity (*Field v. Ridgley*, 116 Ill. 424; *Third S. M. E. Church v. Wetherell*, 43 Ill. App. 414), it might be plausibly argued, that the association would be entitled to set off the deposit against the withdrawal value, because a court of equity would give it that relief. *Waterman on Set-off*, Sec. 398. We therefore hold that the appellant may pay the excess of the value of the shares over the debts of Roberts,

Morse v. Crate.

both on the loan and for the deposit, and upon such payment all interest in the shares must be surrendered to it by the appellee.

The decree of the County Court is reversed and the cause remanded, with directions to the County Court to so order.

Reversed and remanded.

EDWIN D. MORSE

v.

JOHN E. CRATE.

48	513
76	375

Contracts—Action for Goods Furnished and Work Done—Non-compliance with Statutory Requirement as Bar to Action on Contract—Waiver—New Promise—Consideration for.

A man may always bind himself by a promise to pay an honest debt, whatever bar, such as bankruptcy, statute of limitation or the requirement of performance of conditions precedent, may, in fact or law, exist to bar an action on the original contract under which the indebtedness was incurred.

[Opinion filed January 14, 1892.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

MESSRS. BANGS & BANGS, for appellant.

MESSRS. HYNES & DUNNE, for appellee.

MORAN, J. This action was brought to recover for labor and material furnished by appellee upon appellant's house in process of erection, under a memorandum or agreement as follows:

“OCTOBER 7, 1890, E. D. 806 Madison Street,
House 541 West Van Buren Street.

Sold 8 No. 760 mantels with East Lake frame, brass and nickel plate, C. H. dumping grates, and the choice of tile

hearths and facings in the show-room, except the French gray, also 8 dumpers and settings for \$344. The above is O. K.

Signed, E. D. MORSE."

The declaration was the common counts, and the case was tried by the court without a jury, and the evidence, wholly uncontradicted, tended to prove appellee delivered the goods to appellant and did the setting according to the terms of the order; that the work was well done and to appellant's satisfaction; that when appellee called on him for the pay he put him off with some excuse for delay and wrote him letters relating to the payment of the bill, in one of which he said: "I will not ask you to wait longer than the first of next week. * * * Believe me, I will reach you soon. Thanking you for your kind indulgence I remain," etc.; and in another: "On my return to the city will fix matters, and fix you within a few days." The court found for appellee for the amount of his bill, overruling the appellant's demurrer to the evidence.

Appellant's point is that plaintiff has no right of action as he had not complied with Sec. 35 of the Mechanic's Lien Act requiring the contractor to make out and give to the owner a statement under oath of the number and names of sub-contractors, etc. We have held in *Floyd v. Rathledge*, 41 Ill. App. 370, that the making of such a statement under oath, and delivering the same to the owner, was a condition precedent to the maintenance of an action by the contractor upon the contract under which the work was done, but we recognize that such statement might be waived by the owner, and that on proof of such waiver a recovery might be had. Where a common law action is sought to be maintained, the right sought to be enforced arises on the contract and not out of the statute, and therefore a waiver may operate to remove the bar to the action when such waiver would not be effectual to create a lien. *Burnside v. O'Hara*, 35 Ill. App. 150.

The judgment in this case may be sustained on a ground other than that of waiver. The action is maintained on the promise to pay for the material and labor after its receipt and acceptance by appellant. The benefit of the labor and material is a sufficient consideration to support a new promise,

Short v. Kieffer.

which the law will enforce even though an action on the contract under which the work was done and material furnished can not be maintained. A man may always bind himself by a promise to pay an honest debt, whatever bar such as bankruptcy, the statute of limitations, or requirement of performance of condition precedent, may in fact or in law exist to bar an action on the contract under which the indebtedness was incurred.

This is so familiar that it requires no citation of authority. The judgment is right and will be affirmed.

Judgment affirmed.

FREDERICK W. SHORT ET AL.

V.

MARY KIEFFER ET AL.

43 515
142 258

43 515
112 19

Contract for Sale of Land—Part of Contracting Vendors Minors—Whether Vendee Entitled to Specific Performance as Against Adult Parties—Mutuality—Laches of Vendee—Discretion of Court of Equity—Result of Judicial Sale.

1. Even where a contract for sale of land is mutual, the subject-matter within the control of the court, and there has been a prompt offer to perform, a court of equity will still exercise a sound discretion, in view of all the circumstances, as to whether it shall grant a decree for specific performance.

2. Upon the case presented, this court holds that the complainant was not entitled to receive at the hands of a court of equity a decree for the specific performance of the contract in evidence, much less, the subject-matter of that contract having been sold at judicial sale with the full knowledge of, and without objection on the part of, the vendee, and he having made no claim to specific performance prior to that sale, can he be held entitled to relief out of the proceeds of that sale.

[Opinion filed January 14, 1892.]

APPEAL from the Circuit Court of Cook County; the Hon. O. H. HORTON, Judge, presiding.

The appellants, Frederick W. Short, Edmund G. Short and Herman Prenzlauer, filed on June 11, 1891, by leave of court, an amended intervening petition in a case in chancery, pending in the Circuit Court, wherein Mary Kieffer, Jacob Kieffer, Peter Kieffer, Annie Kieffer, Kate Kieffer and Margaret Kieffer, were complainants in the bill, and Frank Kieffer and Christian Kieffer, were defendants. All the above named complainants and defendants in the original cause were made defendants to such amended intervening petition, and filed a joint demurrer thereto. The court, on June 12, 1891, entered an order sustaining the demurrer, and that the amended intervening petition "be dismissed for want of equity."

It appears from the petition, that on December 18, 1879, one Frank Keiffer died in Cook County, leaving a will, whereby he devised all his real estate to his wife, Mary Kieffer, for life, remainder to his children as tenants in common. That the said Frank Kieffer left seven children surviving him, viz., Jacob Kieffer, Peter Kieffer, Annie Kieffer, Kate Kieffer, Margaret Kieffer, Frank Kieffer and Nicholas Kieffer, and that subsequent to testator's death, Christian Kieffer, a posthumous child of testator, was born. About the 1st of January, 1886, said Nicholas Kieffer died, aged about nine years, and intestate, leaving as his only heirs his above named brothers and sisters, and his mother, Mary Kieffer.

The real estate owned by the testator, on which his will could operate, consisted of certain land in Cook County, a part of the southwest quarter of section 36, in township 38 north, range 13.

The petition sets forth that the state of the title, accordingly, after the death of Nicholas Kieffer, about January 1, 1886, was, viz.: Mary Kieffer, the widow, had an estate for life in the premises and an undivided two seventy-seconds of the remainder, and each of the seven surviving children held an undivided ten seventy-seconds of the remainder after her life estate; and, that the premises above described had been occupied by the testator, and after his death, by his widow and children, as a homestead, and that the homestead right had never been abandoned or released.

Short v. Kieffer.

That on December 28, 1889, appellees, Mary Kieffer, the widow, and all the seven children, viz.: Jacob, Annie, Peter, Margaret, Kate, Christian and Frank, signed, executed and delivered to one Louis J. Hitz the following power of attorney: "L. J. Hitz.

Dear Sir: You are authorized to sell, within the next six months, the forty-seven and fifty-one one hundredths acres owned by us, situated in the southwest quarter of Section 36, T. 38, R. 13, at \$700 per acre, one-fourth cash, balance in one, two and three years, with six per cent interest, and we will allow you five per cent commission for selling same, to be deducted out of the first payment—provided you will pay all expenses, court costs and attorneys' fees for perfecting the title to said land by filing bill for partition.

We agree not to place this land in the hands of any one else for sale within said six months.

MARIA KIEFFER, CHRISTIE KIEFFER,
JACOB KIEFFER, MAGGIE KIEFFER,
ANNIE KIEFFER, KATIE KIEFFER,
PETER KIEFFER, FRANK KIEFFER."

The said premises were those devised by the will of Frank Kieffer, deceased.

The petition further states that, acting under the above power of attorney, said Louis J. Hitz, on or about March 26, 1890, made an agreement on behalf of his principals to sell the premises to Frederick W. Short, one of the intervening petitioners, on the terms mentioned in the power of attorney, and that said Frederick W. Short then and there agreed to purchase said premises on said terms. The petition then alleges that in making said agreement Frederick W. Short was acting on behalf of himself and of his co-petitioner, Edmund G. Short, who was a partner of Frederick W. Short.

It also appears, from the amended intervening petition, that on the same day (viz., March 26, 1890), when the agreement above referred to was made, Hitz executed and delivered to Frederick W. Short the following memorandum or note in writing of said agreement:

"CHICAGO, March 26th, 1890.

This is to certify that I have this day sold to Frederick

W. Short the 47½ acres, situated in Section 36, T. 37 N., R. 13, known as the Kieffer farm, for seven hundred dollars per acre, as per terms in contract with the Kieffer heirs, dated Dec. 28th, 1889, and that I have received from him two hundred dollars, as part payment of purchase money, to be used toward legal expenses in perfecting the title to the same.

LOUIS J. HITZ."

Two of the Kieffer heirs who signed the power of attorney given to Hitz on December 28, 1889, were, at that date and at the date of the sale, minors, viz.: Christian Kieffer and Frank Kieffer, aged at the date of the power of attorney, nine and seventeen years respectively. The petition alleges as follows: "That whether or not the said power of attorney and said sale to your petitioner, Frederick W. Short, were valid and effectual as to said Frank Kieffer (the younger), and said Christian Kieffer, who were both infants at the time, said power of attorney and said sale were valid and effectual as against said adult parties, to the same, said Maria Kieffer, Jacob Kieffer, Annie Kieffer, Peter Kieffer, Margaret Kieffer, and Kate Kieffer, and that thereupon, your petitioner, Frederick W. Short, acting on his own behalf and on behalf of said Edmund G. Short, became entitled to a conveyance from said adult parties of all their rights, title and interest in said premises according to the terms of said contract of sale." The petition alleges that in pursuance of the terms of said contract of sale and said power of attorney, and for the purpose of perfecting the title to said premises and carrying out said contract of sale on their part, said Mary Kieffer, Jacob Kieffer, Peter Kieffer, Annie Kieffer, Kate Kieffer and Margaret Kieffer, as complainants, filed the original bill of complaint in this case on the ninth day of April, 1890. The proceedings in the cause after the above named complainants filed the original bill, on the date last mentioned, and prior to the filing, on June 11, 1891, of the amended intervening petition, were as follows:

The bill sought a construction of the will, the description therein of the premises being imperfect, and the complainants also desiring that the interests of the beneficiaries in the

Short v. Kieffer.

property should be judicially declared—and, also, a partition, or, in case a partition would be an injury to the persons interested, then a sale, in lieu of partition.

On June 23, 1830, commissioners reported that the premises were not susceptible of partition, and appraised their value at \$47,500. The court approved the report of the commissioners, and ordered a sale of the premises.

The petition alleges in regard to the sale: "That your petitioner, Frederick W. Short, attended said sale, with the intention of purchasing said premises, in order to thereby acquire the title to the same, to which he and Edmund G. Short were legally entitled, under his contract of sale with the widow and heirs of said testator; at least so far as all of them were concerned except said Frank Kieffer (the younger) and Christian Kieffer; and that, at no time prior to said sale, had any of said Kieffer heirs, nor had said Mary Kieffer, shown any disposition or given any notice to your petitioners, or either of them, that they or any of them, intended to repudiate said contract of sale, and that petitioners supposed that said sale was to be the means whereby petitioners Frederick W. Short and Edmond G. Short should acquire title to said premises, under said contract of sale."

That Prenzlauer also attended said sale, with the intention of purchasing at the same, and was prepared to bid a higher price for said premises than the seven hundred dollars per acre, agreed on in said contract of sale; that thereupon, at the time of said sale, it was agreed verbally between your petitioners, Frederick W. Short and Edmund G. Short, and your petitioner, Herman Prenzlauer, that said Prenzlauer should purchase said premises for the joint benefit of all of your petitioners. "Your petitioners show to your Honors that thereupon, your petitioner, Prenzlauer, purchased said premises at said sale for the sum of \$36,250, cash."

Some weeks after the sale the complainants and defendants in said bill, viz., Mary Kieffer, the adult, and the infant Kieffer heirs, objected to the confirmation of the sale and asked that it be set aside. Prenzlauer, the purchaser, appeared and opposed the setting aside of the sale, and Frederick Short and

Louis J. Hitz made affidavits in aid of Prenzlauer's position. One Henry Sontag having offered upon a resale to bid the sum of \$47,500 for the premises, the court ordered a resale. Upon a resale the premises were, on the 16th of March, 1891, sold to Henry Sontag for \$47,500, \$3,000 in cash being paid down at the time of the sale. March 17th a report of the sale was filed, and April 2, 1891, an intervening petition was filed by Frederick W. Short and Herman Prenzlauer, which petition was amended June 11, 1891, by making Edmund G. Short one of the petitioners. The amended petition offers to allow to Mary Kieffer \$1,000 of the proceeds of the sale as the proceeds of an estate of homestead therein; it declared that no claim was made upon the portion of the minor heirs and offered to allow to Mary Kieffer and the adult heirs, a sum equivalent to what they would have been entitled to out of the purchase price agreed upon in the contract of March 26, 1890, if it had been carried out, and claimed that the balance of the amount realized should be paid to the petitioners in virtue of the rights by them acquired under said contract; in other words, it claimed that of the proceeds of said sale there should be paid to the petitioners, instead of to Mary Kieffer and the adult heirs, about the sum of \$13,000.

A demurrer was filed to the petition, pending which the court, May 6, 1891, confirmed the sale, and the petition having been afterward amended, on the 12th of June, 1891, the court sustained a general demurrer to the amended petition and the same was dismissed for want of equity; from this order the petitioners appealed.

Messrs. FELSENTHAL & D'ANCONA and H. H. MARTIN, for appellants.

Messrs. JAMES O'CONNELL and DUNCAN & GILBERT, for appellees.

WATERMAN, P. J. If it is conceded that the instrument to L. J. Hitz, as far as Mary Kieffer and the adults were concerned, gave to him authority to sell the premises therein

Short v. Kieffer.

described, and that the sale by him made to Frederick Short, May 26, 1890, was in accordance with the power to Hitz given, and that a specific performance *pro tanto* could have been enforced by Frederick Short against Mary Kieffer and the adult heirs, he getting such estate as they had and paying them the purchase price, less a ratable deduction for the interests of the minors, the question would then arise, what are the rights of these petitioners in this application to compel, not a specific performance of the contract as made or a specific performance by a conveyance of the interests of the adults, with compensation to the vendee for the amount the adults are unable to convey—but the thing itself, which was the subject-matter of the agreement, having by consent of all passed beyond the jurisdiction of the court, what are the rights of the parties in this proceeding, wherein the chancellor is asked to decree that the money obtained upon a judicial sale, had with knowledge of, and without objection from, the vendees, shall stand in the place and instead of that contracted for and so sold?

It is well settled that to take a contract out of the statute of frauds, so that a specific performance of it may be ordered, it is only necessary that it be signed by the party to be charged. Browne on the Statute of Frauds, Sec. 366; Cleson v. Bailey, 14 Johns. 484; Farwell v. Lowther, 18 Ill. 252.

A reason often given for enforcing a contract which, by virtue of the statute, is not mutual, is that the other party who had not signed, by the act of filing his bill has made the remedy mutual. Browne on the Statute of Frauds, Sec. 366; Estes v. Furlong, 59 Ill. 298–302; Perkins v. Hadsell, 50 Ill. 216–218, 219; Fry on Specific Performance, Sec. 450.

In the present case, so far as the writing executed by Hitz as the agent of the Kieffers shows, there was no mutuality; Hitz, in acting as their agent, took care only to see that they were bound to sell; he took no pains to see that any written agreement by Short to buy, was made. The petition states what the writing evidencing the contract does not disclose—that Frederick Short, March 26, 1890, agreed to buy; but so far as appears, more than a year elapsed before, April 2, 1891, this

agreement upon his part was made known. Indeed, Frederick Short, the purchaser, failed to disclose that he had agreed to purchase these premises until at a judicial sale thereof they had brought \$14,000 more than he had undertaken to pay. It appears that Frederick Short, in purchasing this property, was acting for himself and Edmund C. Short, but he, Frederick, alone agreed to buy; and whether his pecuniary condition was such that this agreement by him to pay over \$33,000 was of any value, does not appear. The receipt by Hitz, the agent, of \$200, was acknowledged. It is somewhat peculiar that this \$200, paid as a part of the purchase money and which manifestly belonged to the Kieffers, Hitz, who received it, stipulated should be used toward legal expenses in perfecting the title to the premises; that is, should be used toward legal expenses, the cost of which he, Hitz, was, under his employment, himself to defray, and for which he was to receive his five per cent commission. So that under the agreement Hitz, as the agent of the Kieffer heirs, made for them, no money for their benefit was received, but only money to defray expenses which he was to pay. None of this money was ever offered to the Kieffers. It is quite true, as is contended, that in a court of equity the proceeds of the thing to which one is entitled may be followed and relief be granted by treating the proceeds as standing in the place of the thing itself. But we have been referred to no case in which this practice has been extended to the proceeds of property, where such proceeds were the result of a judicial sale, had with full knowledge of, and without objection on, the part of the vendee, and where his claim to a specific performance was not made until after such sale had taken place. The petition does set forth that at no time prior to the first sale had any of the Kieffers shown any disposition to repudiate the contract of sale, and that petitioners supposed that the sale was to be the means whereby Frederick Short would acquire title to the premises under his contract. When objections to the confirmation of the first sale were made, it was obvious that the Kieffers did not intend to carry out the contract; they then had all the title they possessed when the con-

tract was made and the petitioners had ample opportunity before such title had been disposed of, to file a bill for specific performance. The objection that the petitioners failed to avail themselves of such opportunity, is not so much a setting up of *laches* as it is an insistence that by delaying their appeal to the court until after the contracting parties had lost all title, and the court all control of the land, the petitioners abandoned their right to ask for the specific performance.

But could the petitioners have obtained a decree for specific performance of a part, with compensation for the residue, had the land not been, with their consent, sold? Two of the parties with whom the contract was made were minors, aged respectively nine and seventeen years. The petitioners do not claim to have been ignorant of this fact; they merely urge that whether or no the sale was binding as to the minors, it was valid and effectual as to the adults. For some purposes and for some proceedings it may have bound the adults, and yet not have entitled the vendee to a decree of specific performance, for a part, with compensation as to the residue. Where a vendor can not fully perform his agreement, a vendee may in many instances insist upon a part performance, with compensation for the residue. But where the party purchasing is fully aware that the vendor has not the entire title, the case is entirely different. *Castle v. Wilkinson*, 5 L. R. 534, Chancery Appeal Cases; *Waterman on Specific Performance*, Sec. 506; *Peeler v. Levy*, 26 N. J. Eq. 330; *Fry on Specific Performance*, Sec. 1235.

In the present case, in view of the knowledge of the parties, the vendee can not be said to have contracted with the adults for a conveyance of such title as they had, and to pay them a proportionate amount of the purchase money; his contract was with all for the interest of all, and it was a contract which he knew was not binding upon all and which all could not be compelled to perform.

The allegations of the petition are that Frederick Short contracted to purchase and the Kieffers contracted to sell. Had his agreement as well as theirs been in writing, he could not have been compelled to take the interests of the adults and pay them *pro tanto*, for such was not his contract. The

agreement as stated in the petition was to sell and buy the whole, not a part. The contract was that he, Frederick Short, should pay \$700 per acre for 47½ acres; this he has never offered to do. The petitioners allege that they have done everything necessary to entitle them to a conveyance from the adults of all their title to the premises. This is but a statement of a conclusion. What they have done should have been stated. The contract, as stated in the petition, was that he, Frederick Short, would pay \$700 per acre, not after title upon examination had been found to be satisfactory, not upon the termination of a law suit for perfecting the title, but upon the terms mentioned in the power of attorney. These were simply, that Hitz might sell for \$700 per acre, and that he should have five per cent commission, provided he paid all expenses, etc., for perfecting the title to the land by filing bill for partition. The stipulations as to what Hitz was to do in order to become entitled to his five per cent commission did not affect at all the agreement of Frederick Short to buy. He has filed a petition for specific performance without having ever before offered to comply with his contract. A party demanding specific performance of a contract, must show that he has always been ready, willing and eager to perform. *Phelps v. I. C. R. R. Co.*, 63 Ill. 468; *Corwith v. Culver*, 69 Ill. 502; *Beach v. Dyer*, 93 Ill. 295; *Hoyt v. Tuxbury*, 70 Ill. 331.

It is not the case, even where the contract is mutual, the subject-matter within the control of the court, and there has been a prompt offer to perform, that the court will always decree a specific performance. The court exercises a sound discretion in view of all the circumstances. *Beach v. Dyer*, *supra*; *Hoyt v. Tuxbury*, *supra*; *Story's Eq. Juris.*, Sec. 793; *Beach v. Dyer*, 93 Ill. 295; *Waterman on Specific Performance*, 10.

If there were no other objection to granting the prayer of the petitioners, we do not think that the circumstances connected with this contract are such as to require a court of equity to exercise its discretion by ordering a specific performance.

The decree of the Circuit Court will be affirmed.

Decree affirmed.

Union National Bank v. Manistee Lumber Co.

UNION NATIONAL BANK OF CHICAGO
v.
MANISTEE LUMBER COMPANY ET AL.

Contracts — Construction of — Tender—When Waived—Practice—Reversal without Remanding.

1. One party to a contract loses no rights by failing to make a tender contemplated by the contract, where the other party was not ready to perform on his part.

2. When a jury trial is, under the statute, waived, and the case tried by the court, this court may, on review, do what, in its judgment, the lower court ought to have done, and enter judgment accordingly.

3. The correct practice requires the facts to be recited on the record here only when a judgment based upon the facts is reversed without remanding, or with final judgment on the cause of action; but when this court reverses that of the lower court for error in law, and refrains from remanding, the reason why it refrains from an act discretionary need not appear.

[Opinion filed January 14, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. TENNEY, CHURCH & COFFEEN, for appellants.

Messrs. TATHAM & WEESTER and DOVEL & SMITH, for appellees.

GARY, J. This is an action of assumpsit to recover dividends which the appellants claim under an agreement, as follows:

“This agreement, made this 7th day of March, A. D. 1889, between the Union National Bank of Chicago, as party of the first part, the Manistee Lumber Company, and the State Lumber Company of Michigan, as parties of the second part, and William Wentz and R. R. Blacker, as parties of the third part, witnesseth:

43	525
46	457
143	490
43	525
50	530
51	47

43	525
57	524

43	525
58	230

43	525
64	116

43	525
69	127

43	525
106	1275

Whereas the parties of the third part, in connection with other parties and corporations, are engaged in forming a syndicate for purchasing the property and assets of the Manistee Salt & Lumber Company, of Manistee, Michigan (insolvent), and forming a corporation to receive the title thereto, said corporation to be capitalized at an amount not exceeding the actual cost to said syndicate of said property and assets, and for the purpose above stated, the said third parties are desirous of acquiring the claims against said Manistee Salt & Lumber Company now owned by the party of the first part, amounting at the par value thereof to the sum of \$39,000.

Now, in consideration of the premises and the sum of eleven thousand seven hundred dollars (\$11,700) to it in hand paid by the parties of the third part, the receipt whereof is hereby acknowledged, the party of the first part hereby agrees to forthwith assign and transfer its said claims to the said Manistee Lumber Company, one of the parties of the second part hereto, reserving, however, all benefit of any and all collaterals, indorsements or other securities held by the party of the first part in connection with said claim; provided, however, that this agreement is upon the express consideration and condition that the parties of the second and third parts hereto shall proceed without delay to purchase the said property and assets of the said Manistee Salt & Lumber Company, and to form the said corporation with a paid-up capital as above stated, and transfer to said company the title to said property and assets, or cause the same to be done; and said bank shall be entitled to receive, upon the organization of said company and upon a tender to either the second or third parties of said sum of \$11,700 cash, on or before the first day of May, 1889, the fully paid capital stock of said company to the extent and in the ratio that said \$11,700 shall bear to the aggregate cost of said property and assets to said syndicate; but said amount of stock so to be received by said first party shall in no event be less at its par value than \$11,700.

The parties of the second and third parts severally further agree that the said stock, so to be received by said bank at its election, shall be given a representative on the board of

Union National Bank v. Manistee Lumber Co.

directors of the said new corporation to be designated by the first party hereto.

Should said parties of the second and third parts fail to acquire said property and assets, they hereby further agree to pay to said party of the first part the share of any dividends to which the claims hereby agreed to be transferred and assigned shall be entitled, *pro rata*.

Witness the hands and seals of said parties the day and year first above written.

UNION NATIONAL BANK OF CHICAGO,
By J. J. P. Odell, V. P. [SEAL.]
MANISTEE LUMBER COMPANY,
Wm. Wenté, Secretary. [SEAL.]
WILLIAM WENTE, [SEAL.]
STATE LUMBER Co.,
R. R. Blacker, Sec'y. [SEAL.]
R. R. BLACKER." [SEAL.]

The appellees are the parties, other than the appellant, to that agreement.

They purchased on the 18th of June, 1889, the bulk of, but never did purchase all, the property and assets of the Manistee Salt & Lumber Company, about \$25,000 thereof being sold to other parties; and the new company was not organized until February, 1890, and then about \$190,000 of the property and assets that they did purchase did not go to the new company, but were otherwise disposed of. No tender was made by the bank, at any time, of any money in pursuance of the clause relating to a tender on or before the first day of May, 1889, and the appellees have treated, and do treat, the omission of such tender as a neglect by the appellant to perform a condition precedent, by which neglect the appellant has lost all right to the dividends.

In our view of the case, it is quite unnecessary to set out the voluminous evidence, shown by the record, as to what took place between the parties when the contract was made, and subsequent correspondence. The agreement provides that it "is upon the express consideration and condition that the parties of the second and third parts hereto shall proceed without

delay to purchase the said property and assets of the said Manistee Salt & Lumber Company, and to form the said corporation with a paid-up capital as above stated, and transfer to said company the title to said property and assets, or cause the same to be done," and should they "fail to acquire said property and assets, they hereby further agree to pay to said party of the first part the share of the dividends," etc. This last sentence is elliptical; the words, "or form the said corporation," or some equivalent words, being understood as following the word "assets."

The proper construction of the agreement is that all parties contemplated that the new corporation would be formed, and certificates of shares, or some other evidence of title thereto, be ready for the bank to receive as early as May 1, 1889. The clause "and said bank shall be entitled to receive upon the organization of said company, and upon a tender to either the second or third parties of said sum of \$11,700 cash, on or before the first day of May, 1889, the fully paid capital stock of said company, to the extent and in the ratio that said \$11,700 shall bear to the aggregate cost of said property and assets to said syndicate," provides for simultaneous acts—the tender, and consequent payment of the money for the stock that the bank was then to receive for the money. We need not inquire what would have been the result if, after the 1st of May, 1889, the appellees had done all that the agreement required of them, and the bank had then refused to take any stock, or had applied for stock and been refused; the appellees have consistently and persistently refused to acknowledge any further claim of the bank under the agreement, because, as they insist, no tender was made in time. In reply to a letter of June 28, 1889, from the bank, inquiring "when the stock will be ready for delivery, and when we can pay," they say, very politely, under date of July 1, 1889, "Will you please inform us if any time on or before the 1st of May, you tendered or paid us \$11,700, as required in the contract under which you claim the stock. If you did, we have no knowledge of it, and if you did not, we believe you have no further business with us on the Manistee Salt & Lumber Company matter."

The contingency upon which, under the last clause of the agreement, the bank was entitled to dividends, has happened; the bank has lost no right by not making a tender before the appellees were ready to perform on their part; and the appellant should have had judgment for the dividends with interest. It is old law that "if judgment be given against the plaintiff, and he bring a writ of error, the judgment shall not only be reversed (if there be error is understood), but the court shall also give such judgment as the court below should have given." Bacon, Ab., title "Error."

When all trials of fact were by a jury, this principle could be applied, when the question was what judgment should be given on the facts, only where the jury had found them by a special verdict; though *Pearsons v. Bailey*, 1 Scam. 507, is to the contrary; but when, as in this case, a jury trial is, under the statute, waived, and the case tried by the court, this court on review may do what, in its judgment, the lower court ought to have done, and thus apply to new conditions the principle of the old law. *Prince v. Lamb*, Breese, 378.

It was under such conditions that the Supreme Court justified this court in rendering final judgment for the plaintiff, on the facts, in *Com. Ins. Co. v. Scammon*, 123 Ill. 601; *Scammon v. Com. Ins. Co.*, 20 Ill. App. 500. In fact, though the reports do not show it, the remanding order shown by the report of the case here was stricken out, and the facts found and final judgment entered here, at the request of both parties, that the case might be taken to the Supreme Court without delay. The power of the court to find the facts, and render judgment upon them contrary to that of the court below, was not here discussed. While a finding here of the facts, after a jury trial, contrary to the verdict, may, under Sec. 87 of the Practice Act of 1872, be made the "final determination of" the cause, in case the judgment below is simply reversed without remanding, yet such judgment is no bar to another action. 2 Phillipps on Ev. (C. & H.) 18 star page; *Herman Estop.*, Sec. 105; *Freeman Judg.*, Sec. 481; 2 *Black. Judgt.*, Sec. 683; see, especially, *Close v. Stuart*, 4 Wend. 95.

Without infringing upon the constitutional right of trial by

jury, such finding can only be considered as the justification by the court, to itself, for not remanding the cause. If the only error arises on the facts, the section cited requires, if the cause is not remanded, that the facts as found be recited in the record; but if the reversal be for error of law, that section does not touch it, and the old and universal rule was that remanding was discretionary. *Fries v. Penn R. R.*, 98 Pa. St. 142. No statute requires it. It is but another name for a *venire de novo*, the power to direct which, on a judgment of reversal, was originally a very grave question. The cases are collected in brief of counsel in *Sterret v. Bull*, 1 Binney, 138; Bacon Ab., "Error," M. 2. In this State, it seems to have been assumed without question. *Smith v. Bridges*, Breese, 18. If the suit can not be prosecuted it will not be remanded. *Ditch v. Edwards*, 1 Scam. 127. Or if it would be an injury, and not a benefit, to the party asking it. *Brown v. Clark*, 3 John. (N. Y.) 443.

The right practice would seem to require facts to be recited on the record here only when the judgment of this court is based upon the facts; either in reversing without remanding or with final judgment on the cause of action; but when the judgment of this court reverses that of the lower court for error in law, and this court refrains from remanding, the reason why it refrains from an act discretionary need not appear. *Thomas v. Fame Ins. Co.*, 108 Ill. 91.

The judgment below will be reversed and judgment will be entered here for the appellant for the amount of the dividends and interest.

Judgment reversed.

JANET SMITH

V.

JAMES B. GOODMAN, ASSIGNEE.

Insolvency—Claim of Landlord to Preference—Rent Accruing after Assignment.

The petition of a landlady to the County Court, in an insolvency case, to

43	530
149	75
43	530
54	610
43	530
58	295
43	530
64	138

Smith v. Goodman.

award to her, as a preferred claim, rent that accrued under a lease, after the assignment, upon the ground that the assignee, by his conduct, elected to take the term under the lease as such assignee, refused. Such a claim, if valid, exists against the assignee personally.

[Opinion filed January 14, 1892.]

APPEAL from the County Court of Cook County; the Hon. FRANK SOALES, Judge, presiding.

Messrs. TOLMAN & SIMONS and DOOLITTLE, McKEY & TOLMAN, for appellant.

Messrs. HERRICK & ALLEN, for appellee.

GARY, J. The appellee is assignee in insolvency of the C. J. L. Myer & Sons Co., a corporation, administering its assets under the direction of the County Court. The appellant was the landlord—if a lady may be a lord—of the corporation, and had been paid all the rent that accrued under the lease during the period that the appellee occupied the premises. By her petition to the County Court she asked that court to award to her, as a preferred claim, over the claims of the general creditors, the residue of the rent that accrued under the lease, upon the ground that the appellee, by his conduct, elected to take the term under the lease as such assignee. How the supposed consequence, that the rent would thereby become a preferred claim, follows, is not very clearly expressed, either in the petition or brief of the appellant. The County Court denied her petition and she appealed.

That rent accruing during the occupation by the assignee for the purpose of winding up the business of the assignor, might be allowed as expenses of the administration in preference to general debts, may be conceded. *Singer v. Leavitt*, 33 Ill. App. 495; *Baker v. Singer*, 35 Ill. App. 271. But if the appellee is charged as assignee of the lease, on the ground that he has elected to take it, he is charged, not representatively, with a debt to be discharged out of the assets of the assigned estate as between himself and the landlord, but personally. Of such a

claim, if exceeding one thousand dollars, the County Court has no jurisdiction; and if not so exceeding has jurisdiction only in an action at law against him. Sec. 7, Act March 4, 1874, County Courts. Most of the cases cited by the appellant to show that the appellee had, by his conduct, elected to take the term, are cases in which it was held that by such election the defendant became personally liable. *Hanson v. Stevenson*, 1 B. & Ald. 303; *Clark v. Hume, Ryan & M.* 207; *Carter v. Wayne*, 4 Car. & P. 191; *Thomas v. Pemberton*, 7 Taunt. 206; *Dorrance v. Jones*, 27 Ala. 630; *Horwitz v. Davis*, 16 Md. 313. Other cases cited do not present the question of such personal liability. See also *Turner v. Richardson*, 7 East, 335; *Naist v. Tatlock*, 2 H. Bl. 320; *Doe v. David*, 5 Tyrwhitt, 125; 3 Winn's Exrs., 1853; *Taylor L. & T.* 458.

What remedy the appellant has under Sec. 10 of the act concerning assignments, or whether the appellee is personally liable, of course we do not decide.

She presented no claim under that section, and if his conduct made him assignee of the term, his liability, if any, was personal, which the County Court had no jurisdiction to enforce.

The judgment is affirmed.

Judgment affirmed.

LEE M. BONHEIM

V.

JOHN MEANY.

Mechanics' Liens—Action for Labor and Material—Requirements of Statute as Condition Precedent—Sec. 35.

The making of the statement required by Sec. 35 of the Mechanics' Lien Law is a condition precedent to the maintenance of an action by the contractor upon his contract.

[Opinion filed January 14, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding.

Bonheim v. Meany.

Messrs. ABBOTT & BAKER, for appellant.

Messrs. WILLETT & JOHNSON, for appellee.

MORAN, J. Appellee made a written contract in February, 1889, for doing the plumbing work and furnishing the materials therefor on appellant's house according to certain plans and specifications.

This action was commenced before a justice to recover a balance alleged to be due to appellee on said contract. From the justice's judgment an appeal was taken to the Superior Court, and on a trial there by the court, a jury being waived, there was a finding and judgment for appellee. Exceptions to the finding and to overruling the motion for a new trial were duly preserved by appellant. The appellee did not make and give to the appellant a statement under oath of the number and names of mechanics or workmen in his employ on the work or of those furnishing material therefor, etc., as required by Sec. 35 of the Mechanics' Lien Act as it stood when the contract for the work was made and the work performed. Said section of the law provides that until said statement is made the contractor shall have no right of action against the owner on account of such contract. The making of such statement is a condition precedent to the maintenance of the action, unless where the proof shows that such statement has been waived by the owner, or there is an acceptance of the work and unconditional promise made to pay for it, after the work is done. There is in this case no evidence whatever tending to show a waiver of such statement or a subsequent promise to pay for the work. Failure by the owner to request the contractor to furnish such statement is no waiver of it. The law makes the furnishing of such statement a necessary element to be proved by him in order that he may bring and maintain his action. See *Floyd v. Rathledge*, 41 Ill. App. 370, and *Wieska v. Imroth*, 43 Ill. App. 357.

The judgment must be reversed.

Judgment reversed.

JULIUS LAUSTER, ADM'R,
V.
THE CHICAGO, MILWAUKEE & ST. PAUL RAILWAY
COMPANY.

Personal Injuries—Peremptory Instruction for Defendant—When Justified.

In an action against a railway company to recover damages for the death of a person, alleged to have been caused by defendant's negligence, where there is absolutely no evidence to show that deceased was in the exercise of due care at and just before the accident which caused his death, a peremptory instruction for the jury to find for the defendant is proper.

[Opinion filed January 14, 1892.]

APPEAL from the Circuit Court of Cook County; the Hon. S. P. McCONNELL, Judge, presiding.

Messrs. ADAMS & HAMILTON, for appellant.

Messrs. WALKER & EDDY, for appellee.

GARY, J. On the afternoon of the 9th day of May, 1882, Christof Zilly, residing at Turner Park, a station on the road of the appellee, a few miles northwest of the business center of Chicago, was seen in the city at about six o'clock; nothing more is known of him, until at about half past nine o'clock of that evening, he was found upon the pilot of an outward bound locomotive of the appellee, unconscious from injuries, of which two days later he died. There is no doubt that he was driving a one horse wagon toward his home on what is called the Whiskey Point Road, a road which for a very considerable distance runs nearly parallel with the track of the appellee, and crosses it at a very acute angle, nearly a mile before Turner Park is reached.

This action is brought by the administrator against the railway for causing the death of Zilly. The claim of the appel-

lant is, that in approaching the crossing, no bell was rung or whistle blown on the locomotive, and that Zilly was struck at the crossing; the appellee asserts that Zilly reached the crossing first, and did not follow the Whiskey Point Road from the crossing of the track, but drove along the track, and the locomotive overtook him, without any opportunity for the engineer to avoid the casualty after he discovered that something was on the track. However unsatisfactory may be the testimony tending to show that the collision occurred at the crossing, if the case turned upon that issue, it should have been left to the jury. But for two years Zilly had resided at Turner Park, coming into the city twice each week or oftener, always driving upon the Whiskey Point Road. Every rod of the way must have been as familiar to him as his own door yard, and with the highway and the railway track so nearly parallel, though approaching each other (being but two hundred and twenty-two feet apart half a mile east of the crossing), it seems impossible that Zilly could have been giving any attention to the surrounding circumstances, if, in fact, he was struck at the crossing, whether any bell was rung or whistle blown or not. No witness saw him at the crossing; the nearest witness of the appellant was twenty-five hundred feet away; in the darkness all that they could see was the headlight.

The conduct of Zilly at the time of, and immediately before, the collision, is therefore not susceptible of proof, and it must be inferred. The propriety of a peremptory instruction to find for the defendant, in a case where the evidence is wholly insufficient to support a verdict for the plaintiff, is not questioned by the appellant, and has been often affirmed by the Supreme Court. In our judgment this is such a case, and the Circuit Court properly gave this instruction:

“The jury are instructed as a matter of law, that before the plaintiff can recover in this action, it must appear by a preponderance of the evidence in this case that deceased, Christof Zilly, was, at the time of the accident complained of herein, exercising reasonable care, prudence and caution for his own safety, and there being no evidence in this case that he was at the time and immediately before the time of the injury com-

plained of, exercising reasonable care and prudence, your verdict must, therefore, be for the defendant."

The judgment is therefore affirmed.

Judgment affirmed.

48	536
101	154

PATRICK DIGNAN AND JACOB WEINER

v.

JAMES H. GILBERT.

Practice—New Trial—Bill of Exceptions.

1. A motion for a new trial, and exceptions to the action of the court thereon, must be made a part of the record by a bill of exceptions, or this court can not take notice thereof.

2. A recital by the clerk, upon the record, is no part thereof.

[Opinion filed January 14, 1891.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Mr. W. C. ASAY, for appellants.

Messrs. RICHOLSON, MATSON & PEASE, for appellee.

GARY, J. This is a ridiculous case. There is a paper in it called a bill of exceptions, but there is no exception to anything in it. The clerk has recited upon the record that a motion for a new trial was made and refused, and that the defendants, appellants, excepted; but such recital goes for nothing. The only quarrel is with the finding upon the facts. *Foreman v. Johnson*, 37 Ill. App. 452.

Judgment affirmed.

Snow v. McCormick.

TAYLOR A. SNOW
V.
CYRUS H. McCORMICK.

43	537
57	334
43	537
82	55

Trespass Qu. Cl.—Construction of Statute—Responsibility of Agent—Ejectment.

1. The statutory provision abolishing, after a recovery in ejectment, the action for *mesne* profits, and substituting a suggestion in assumpsit, does not apply to an action against a party not a defendant in the ejectment suit.

2. The execution of a lease by a person acting as agent for another, authorizing the continuation of a trespass, makes the party executing such lease liable to the party entitled to the possession at the time of the commission of the trespass.

[Opinion filed January 14, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Mr. ROBERT B. KENDALL, for appellant.

Mr. WILLIAM T. BURGESS, for appellee.

GARY, J. This is an action of trespass *qu. cl.* by the appellee against the appellant. The record shows that on the 20th day of April, 1872, Henry H. Walker conveyed the *locus in quo* to Mary Dunn, and she then executed a trust deed in the nature of a mortgage, to secure the unpaid purchase money to John G. Rogers, then one of the judges of the Circuit Court of Cook County, whose sudden and untimely death a few years ago shocked his brethren of the profession and a large circle of loving friends. On the 4th day of April, 1885, under the power contained in the trust deed, Judge Rogers sold the premises for default in the payment of the purchase money, and conveyed them to the appellee. He sued at the April term, 1887, of the Superior Court, in ejectment, Mary

Dunn and her daughter, Ada M. Dunn. The former disclaimed possession, and the suit proceeded to judgment and execution against Ada M. Anderson, she having married *pendente lite*. The suit was dismissed as to Mary Dunn.

Ada M. Dunn, afterward Anderson, was in possession of the premises, from the 30th day of April, 1885, until dispossessed on the 18th day of July, 1889, by the suit in ejectment, under a lease from Asahel Gage to her, which lease was executed by the appellant as agent for Gage. The execution of this lease is the only connection which the record shows him to have had with any of the events narrated. On the 19th day of July, 1889, this suit was commenced against Gage and the appellant, and the verdict was against the appellant only. From the judgment on that verdict this appeal is prosecuted.

The first point made by him is that this action is for *mesne* profits, after a recovery in ejectment, and that the statute has abolished that action, and substituted a suggestion in assumpsit for it. Secs. 43, 44, "Ejectment;" *Harding v. Larkin*, 41 Ill. 413; *Ringhouse v. Kenner*, 63 Ill. 230. To that point the reply of the appellee in effect is, that this action being against persons not defendants in the ejectment, is not governed by the statute, which is a good reply, for the statute makes the suggestion and the proceedings thereon a continuation of the ejectment suit, which could only be when the damages were claimed from the defendant therein, or from some successor substituted in the place of the defendant, if that might be under the statute.

When the appellee obtained possession of the premises by the proceedings in ejectment, as to any other than the defendant thereto, he was, or if he had obtained such possession by entry only, he would have been entitled to recover in trespass, for injury to the premises and damages by him sustained by being kept out of them while he was entitled to the possession. *Scheffel v. Weiler*, 41 Ill. App. 85, where authorities are cited. But in such action he must prove not only that the party sued was the party guilty, but his own right of possession at the time of the wrong done. It is true that all who authorize a trespass are themselves trespassers, and we will not say that

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the act of the appellant in executing as agent for Gage, a lease to one who actually occupied, is not such an act as charges him. *Hamilton v. Hunt*, 14 Ill. 472; *Gilbert v. Eminons*, 42 Ill. 143; *Rosenkrans v. Barker*, 115 Ill. 331; *Davis v. Chewkirk*, 5 Denio, 92; *Herring v. Hoppock*, 15 N. Y. 409.

Then how, as against the appellant, is the right of possession by the appellee proved? The right of possession in this case accompanied the title. There is no evidence of title from the government. The judgment in ejectment, to which he was not a party, does not *ex proprio vigore* bind him, and there is no evidence that he had notice to, or did, participate in the defense. But Mary Dunn was in possession claiming the fee. This, of itself, is evidence of a fee in her. Her title has passed to the appellee, and under it he may recover against one not showing a better. *Keith v. Keith*, 104 Ill. 397, and cases there cited. It is clear that at the time Ada M. Anderson took possession under the lease she was a member of her mother's family, and that the surrender of possession by the mother to the daughter was an attempt by them to aid Gage in his quarrel with the appellee about the land. On the whole case the appellee was entitled to recover. The act of the appellant in executing the lease seems slight, but the fact that he acted for another is no excuse. 1 Addison on Torts, Sec. 526.

The lease which he executed authorized the continuing trespass by Mrs. Anderson. The appellee has assigned cross-errors. We can not increase the judgment and doubt if he wants it reversed. The only ground upon which to disturb it is, that the court should have granted him a new trial on account of the insufficiency of the damages. The testimony as to rental value was not very satisfactory, and whether the appellee should have been permitted to prove attorneys' fees in the ejectment as damages is a question not fairly upon this record, as no witness having knowledge of what the fees should have been was called. The exception to what the judge said abstractly is idle; it is the course of the trial, in fact altered to the prejudice of the party, that is the subject of exception. If he still wants a new trial the appellant will probably agree to begin again. The judgment is affirmed.

Judgment affirmed.

CHICAGO & EASTERN ILLINOIS RAILROAD COMPANY
V.
MARY SHANNON, ADMINISTRATRIX.

Master and Servant—Personal Injuries—Negligence—Question of Fact—Damages.

In an action against a railroad company to recover damages for the death of plaintiff's intestate, this court holds that there was sufficient evidence to support the verdict for the plaintiff, and that the court could not, as matter of law, say that deceased was guilty of contributory negligence.

[Opinion filed January 14, 1892.]

APPEAL from the Circuit Court of Cook County; the Hon. S. P. McCONNELL, Judge, presiding.

The principal question in this case is, whether Charles Shannon, the deceased, was exercising ordinary care for his own safety at the time when, working in appellant's switch yard, he was struck by a moving train and killed. Shannon was a track repairer, working, upon the day he was killed, with a shovel, in company with one Hughes, on a track known as "No. 2." They saw a train coming from the south on that track, and both stepped off to allow it to pass. Hughes stepped into the space between tracks Nos. 1 and 2; Shannon stepped on the [next track west, known as the coal track. Shannon, standing there, naturally faced to the south, watching the approaching train, to avoid which they had stopped work and stepped aside. Hughes and a witness named Quinn, saw a train to the north switching back and forth on the coal track, but whether Shannon at any time observed this switching train, is unknown. There was evidence that a few feet to the north of Shannon and on the track upon which he was standing, was a detached freight car, called by the witnesses a "dead car," and that this car prevented him from seeing the switching train as it came south on that track.

The switching train was backing two cars and drawing one, the engine being between. The cars thus backed toward Shannon stopped, the engineer thinking they had passed a switch by which the car north of the engine was to be taken off; being signaled to go farther north, again moved the train southward, and at this time the train ran over Shannon, he being either struck by the southernmost of the two cars to the south of the engine, or the train ran against a "dead car" and it ran over him. The bell of the engine was ringing but there was no one on the front or south end of the train.

Mr. W. H. LYFORD, for appellant.

Mr. C. H. MITCHELL, for appellee.

WATERMAN, P. J. We do not think that the evidence of want of care for his own safety on the part of Shannon was such as made it the duty of the court to take the case from the jury. Shannon did not recklessly rush into danger; he stepped aside to avoid a coming train, and while it is true, had he remained between the tracks he would have remained, in all probability, unharmed, yet such place would not have been entirely free from danger. Few people from mere choice like to stand so close to a passing engine and cars as he would have been when standing between the tracks; and as a place of absolute safety no one would choose it. If there was on the track upon which he placed himself a dead car, a position in front of it would not seem to be very dangerous. True, he misjudged, and it is perhaps the case that he was not as watchful as he might have been; but this court can not, upon the record here presented, say that it is manifest that he failed to exercise ordinary care; the verdict of the jury upon that point is, upon the record before us, conclusive. That there was evidence justifying the finding of the jury that appellant's servants were negligent, is clear. If there was a "dead car" upon the track, evidence that under the circumstances appellant's employes backed a train upon this car with sufficient force to cause it, as the witnesses say, to "jump"—that is,

start suddenly forward—was sufficient to warrant a finding of negligence. We do not think that the evidence establishes that Shannon and the crew of the switching train were fellow-servants in the sense that absolves appellant from liability for injury to one arising from the negligence of the other. They were not brought into habitual consociation; were not engaged at the time of the accident in the same work; nor is it clear that the accident arose from one of the dangers necessarily incident to Shannon's employment. True it is that deceased was employed in a place of danger, and that he assumed the ordinary risks of his employment; but it was not shown that the danger of a "dead car" being run against with sufficient force to start it suddenly forward was one of the ordinary hazards of the work for which he was employed.

There was some evidence that the deceased was not living with his wife at the time of the accident, but there was nothing tending to show that she was not entitled to support, whether she received it or not. We can not think the damages excessive. On the contrary, the smallness of the verdict, \$1,000, indicates that the jury calmly considered the law as given by the court in connection with the evidence adduced, and deliberately, without passion or prejudice, rendered a verdict, instead of, as is too often the case in suits against great corporations, hastily returning the highest verdict allowed by law.

Judgment affirmed.

JOHN DOWNEY

V.

ERVIN HOPKINS AND DOUGLAS V. CARTER.

Practice—Omission of Instructions from Abstract.

Appellant having failed to comply with the rules as to printing his abstract, the judgment must be affirmed.

[Opinion filed January 14, 1892.]

Downey v. Hopkins.

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Mr. JOHN C. PATTERSON, for appellant.

Messrs. OSBORNE BROS. & BURGETT, for appellees.

GARY, J. Downey and Hopkins are neighbors. Hopkins occupies a lot between which and a street is Downey's lot, but it being eight feet shorter than Hopkins' lot, the latter has access to the street through an alley over those eight feet. Downey complains that Hopkins has done him great wrong in the manner he has used that alley. The record is large, two hundred and eighty pages of testimony alone. The court gave instructions at the instance of the plaintiff, four without, and more with modification; but how many more, and what, or with what modification the record does not show, as but one of them is copied in it. None were given on the request of the defendant. The abstract contains but the one modified instruction, only referring to pages of the record for the unmodified. This is no compliance with the rule, which we must enforce, if we would have it observed. *McGillis v. Gale*, 36 Ill. App. 316; *Parry v. Arnold*, 33 Ill. App. 622. Without encouraging disregard of it, we can not inquire whether there be error in the instructions. But if the abstract were ever so full, as the record does not contain all the instructions, the result would be the same. To review the evidence would occupy a great deal of space. Suffice it to say, that we find the case was fairly tried, and the verdict of the jury not unwarranted by the evidence.

Judgment affirmed.

THE FIRST NATIONAL BANK OF CHICAGO

V.

DANIEL K. TENNEY ET AL.

Agency—Duty of Principal to Indemnify Agent for Expenses and Services—Right of Agent to Protect Himself Against Liability.

1. A principal is bound to indemnify his agent against the consequences of all lawful acts done by him *bona fide* in pursuance of the authority conferred.

2. When an agent is sued for an act done in pursuance of his employment, he is not bound to let judgment go against him, but may defend and recover from his principal, the expenses of a defense *bona fide* made; he may also prosecute an appeal from an adverse judgment.

[Opinion filed January 14, 1892.]

APPEAL from the Circuit Court of Cook County; the Hon. S. P. McCONNELL, Judge, presiding.

In May, 1876, the John B. Jeffery Printing Company owed the First National Bank of Chicago \$25,000, for which the bank held its note. The bank also held as security for this note, two judgment notes of the company aggregating \$40,000, the property of Emma J. Jeffery, who had indorsed them to the bank to help the company. Emma Jeffery was the wife of John B. Jeffery, the president of the printing company. She also held other judgment notes of the company. A few months previous she had retained appellees, plaintiffs below, to look after her interest in case the printing company fell into financial troubles. She had done this because of threats a stockholder was making against the company. About this time Daniel K. Tenney, one of the plaintiffs, had come to an understanding with Gage, the vice-president of the bank, that he, Tenney, should keep the bank informed and, in respect to its claim against the printing company, act for it as well as for Mrs. Jeffery. Shortly after this Tenney became satisfied that immediate action was necessary to protect the bank and

48	544
58	432
48	544
62	635

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Mrs. Jeffery. He told Gage what he thought, who agreed with him and gave him both the bank's note and the two notes of Mrs. Jeffery which the bank held as collateral, instructing him to enter judgment on the bank's note first in order, and to have the judgments entered on Mrs. Jeffery's two notes immediately assigned to the bank to be held as collateral, as the notes had been. It was also agreed between Tenney and Gage that he, Tenney, should have the bank's judgment entered in his, Tenney's, name. Tenney did as he was directed, the first judgment being in Tenney's name on the bank's note for \$25,170.50; next two judgments in favor of Mrs. Jeffery, aggregating about \$40,000, on the notes which the bank had held as collateral; a third judgment was entered in favor of Mrs. Jeffery for about \$11,000; another judgment in favor of Burr Robbins for \$5,000, and last one in favor of the W. O. Tyler Paper Company for about \$23,000. All these judgments were obtained May 19, 1886, by the plaintiffs, as attorneys for the respective judgment creditors. Executions on the bank or Tenney judgment, and on the first two of Mrs. Jeffery's, were levied at once on the tangible assets of the company, and on the next morning, in the Superior Court, creditors' bills were filed, based on the other judgments, and a receiver for the company was appointed. On the first of June thereafter, the J. W. Butler Paper Company filed its bill in the same court, making the company, the bank, D. K. Tenney, the other judgment creditors, the sheriff, the receiver and others, parties defendant, charging that the judgments entered on May 19th were in pursuance of a fraudulent purpose of John B. Jeffery to defraud the complainant and other creditors, and to wreck the company; that Tenney's judgment was held for the use of the bank, and that he and his partners were attorneys for John B. Jeffery and the printing company, and had been employed by Jeffery to carry out his wicked schemes; also alleging that the judgments in favor of Mrs. Jeffery and Robbins were without consideration. On this bill, the sheriff was temporarily enjoined from selling under the execution. The judgment creditors, Tenney and the bank answered, denying the fraud charged, etc.

In July, by order of the Superior Court, in the creditor's suit of Emma J. Jeffery, the receiver sold the tangible assets to D. K. Tenney for \$75,000, as trustee for the judgment creditors; which sum was applied, under the order of the court, to the extinction of the bank or Tenney judgment, and the first two of Mrs. Jeffery's, and in a partial payment of Mrs. Jeffery's third judgment. The order required that the judgment creditors should give bond to repay the money so received in case the court should ultimately decree the repayment, and this bond in the case of the Tenney judgment was given by the bank as the real owner of the judgment. A like sale was afterward made of the accounts, also to Tenney, trustee, and payment was made by applying the price on the remaining judgment. Tenney then advised the organization of a new corporation to acquire the plant, good will, etc., of the old one by purchase. This was done, under a plan devised by a Mr. Cothran. Tenney's connection with the reorganization seems to have been merely to transfer the assets which he had purchased as trustee, as directed to do by the *cestuis que trust*.

The bill of the Butler Paper Company having been taken by change of venue to the Circuit Court, that court on the 18th of April, 1889, entered a decree finding, among other things, that the judgments of May 19, 1886, were entered in the execution of a fraudulent conspiracy to wreck the printing company, and to defraud creditors other than the judgment creditors; and that the conspirators were John B. Jeffery, George T. Pomeroy, Daniel K. Tenney, Emma J. Jeffery, and the officers of the Tyler Paper Company. It further decreed that Daniel K. Tenney, Emma J. Jeffery, Burr Robbins and the Tyler Paper Company, should respectively pay to the receiver the amounts which had been applied on their respective judgments in the receiver's sale of the assets to Tenney, trustee. The court in its decree reserved for further consideration, upon testimony to be thereafter taken, the question of the right of the judgment creditors to share as general creditors in the distribution of the funds which they were required to pay into court.

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Immediately upon the rendering of this decree of the Circuit Court, the question arose, at least in the minds of D. K. Tenney and the officers of the bank, what the bank would do in order to protect Tenney from the decree entered against him. A petition for a rehearing was filed by the bank and Tenney, supported by the affidavits of Mr. Tenney and Mr. Gage, in which petition it was stated that the rights and interests of the bank and Tenney were greatly prejudiced by said decree, and they prayed for a rehearing as to so much of the decree as related to the judgment of the bank entered in the name of Tenney, and that the decree to be entered should preserve the rights of the bank to a prior lien upon the property in question. The petition for rehearing was denied. An appeal from said decree was prayed by the First National Bank, by D. K. Tenney, the Tyler Paper Company, Burr Robbins, Emma J. Jeffery, and John B. Jeffery. Although the bank joined in the petition for a rehearing and prayed an appeal, it took pains to have stated in open court, upon the prayer for an appeal, that it found no fault with the decree of the Circuit Court; and the bank, after considerable talk by its officers with Mr. Tenney, declined to prosecute the appeal, but expressed a willingness that Tenney should on his own account do whatever he saw fit to relieve himself from the liability imposed upon him by the decree of the Circuit Court. Tenney accordingly prosecuted his appeal to the Appellate Court, and in that court the decree of the Circuit Court was reversed, with directions to dismiss the bill as to Robbins and Tenney at the cost of the Butler Paper Company. This suit was brought to recover for the services and expenses of Tenney in procuring a reversal of the decree against him; it being by stipulation agreed that the defendant waives any objections that some of the items in the bill for which this suit was brought should have been sued for in the name of D. K. Tenney individually, and also that some of the items are for services and expenses incurred after the bringing of this suit.

Mr. ORVILLE PECKHAM, for appellant.

No assumpsit will be implied against the express declaration of the party to be charged. *Whiting v. Sullivan*, 7 Mass. 107; *Jewett v. Inhabitants of Somerset*, 1 Me. 125; *Metcalf on Contracts*, 9; 1 *Story on Contracts*, § 12; *Child v. Morley*, 8 Durnford & East, 610.

In the Massachusetts case cited, the facts were that the plaintiff sold a horse to the defendant which turned out on trial not to be all that the plaintiff had represented it to be. The defendant thereupon returned it to the plaintiff with a letter explaining that he did so because he had been cheated in the purchase. After reading the letter, the plaintiff significantly remarked to the defendant's messenger: "So, Mr. Sullivan has sent me his horse to keep." This view the messenger repudiated, saying, "No, he has returned your horse to you and will have nothing further to do with him." The plaintiff kept the horse for a year, and then sued for its keep, and contended that defendant had no right to disclaim the horse, and therefore continued to be its owner, and ought to pay for keeping it. Plea, *non assumpsit*. Plaintiff got a verdict, which the Supreme Court set aside.

The court, speaking by Chief Justice Parsons, says:

"As the law will not imply a promise where there was an express promise, so the law will not imply a promise of any person against his own express declaration, because such declaration is repugnant to any implication of a promise. *
* * In this opinion our brother Parker, before whom the cause was tried, upon consideration of the case, fully concurs. It was imprudent in the plaintiff to take the horse if he was determined to hold the defendant to his bargain. Perhaps he might think the defendant's right to rescind doubtful, and might choose to keep the horse until that question was decided, and if it should be decided against him, then he would be keeping his own horse, otherwise he might attempt to charge the defendant. On this view the plaintiff must fail; for whether the defendant impliedly promised or not, at the return of the horse, could not depend on a subsequent event. He must have impliedly promised when the horse was returned, or never after. Such a contingent agreement

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might have been expressly made by the defendant, but can not be implied."

The latter part of the passage quoted has a special application. The learned judge who gave judgment against us in the Circuit Court did so on the ground that the result of Tenney's appeal tested the bank's liability for the expense of it; since this court had reversed Judge Tuley, the bank was liable, he held; if it had affirmed him, the bank would not have been liable. This view had not been advanced or discussed by anybody on the trial. We shall refer to it again.

In the Maine case certain commissioners for the laying out of a public road applied under the law to the Court of Sessions of the county to have the same located, etc. The court acted favorably on their petition, but adjudged that the work should be done at the expense of the petitioners, and in the warrant issued to the committee appointed to do the work this condition was repeated. When the work was done the petitioners refused to pay the expense of it, on the ground that it was a public service and chargeable to the county. Suit was thereupon brought against the county. On the trial it was insisted, among other arguments, that it was the duty of the county to bear public expenses of this character, and that the Court of Sessions transcended its powers under the law in fixing the condition upon its judgment.

The Supreme Court, by Mellen, C. J., says:

"The single question is whether this action can be maintained; and we are all very clear that it can not. No express promise is pretended to have been made. Does the law imply one? In a declaration upon a promise on a consideration which is past, it is always necessary to allege that the act performed, or sum paid, was performed or paid at the request of the defendant. 1 Chitty, 297; *Livingston v. Rogers*, 1 Caines, 583. But in the present case all implication is rebutted by the adjudication and the warrant, in both of which it is declared that the petitioners—not the county—are to defray the expense. Instead of a request there is an express refusal, and notice of this refusal given to the plaintiffs before they entered on the service. They were under no obligation to

proceed until their fees and expenses were paid to them, and if they have imprudently given credit it is not the fault of the county. The principle of *Whiting v. Sullivan* (*supra*) is sound and familiar. The law will not imply a promise against the protestation of him who is attempted to be charged with it."

The innocent principal is not bound to indemnify the innocent agent unless the business of the agency was the proximate cause and not merely the occasion of the loss or damage. Story on Agency, Sec. 341; *Powell v. Trustees of Newberg*, 19 Johnson, 283; *Ruffner v. Hewitt*, 7 W. Va., 585, 634; *Corbin v. Am. Mills*, 27 Conn., 277; *D'Arcy v. Lyle*, 5 Binney, 441; *Am. Lead. Cas.*, 718, *726.

In *Powell v. Trustees of Newberg*, 19 Johnson, 283, the trustees of a village had been sued for acts done in their official capacity which were alleged as done maliciously and illegally. On the trial they had been found not guilty, and had got judgment in their favor, but having incurred expense in their defense against the suit, they sued the village for reimbursement. They were allowed to recover, very justly, since their outlays pertained strictly and undoubtedly to the service which they owed and were rendering to the village. In deciding the case, the court (Spencer, C. J.) refers to a number of cases where the principle involved there and here was applied; among others, to *D'Arcy v. Lyle*, 5 Binney, 441, where (to quote from the opinion in *Powell v. Trustees*, etc.) "Ch. J. Tilghman expressed his approbation of the law as laid down by Heineccius, b. 13, pp. 269, 270, and 2 Ersk. Inst. 534, that damages incurred by an agent or in the course of the principal's affairs, or in consequence of such management, were to be borne by the principal. It was admitted that when an agent, on a journey on business of his principal, was robbed of his own money, the principal would not be answerable, because carrying his own money was not necessarily connected with the business of his principal. So, if he received a wound, the principal is not bound to pay the expense of the cure, for it was the personal risk of the agent."

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Mr. WILLIAM E. CHURCH, for appellees.

Of course it will be conceded that the decree constituted no adjudication of the rights of these parties as between themselves; it did not undertake to adjudicate them, nor could it have done so. Parties to a judgment are not bound by it in a subsequent controversy between themselves unless they were adversaries in the original action. Freeman on Judgments, Sec. 158; Graham v. R. R. Co., 3 Wall. 704.

A rule of law which pervades the whole law of principal and agent, is that the principal is bound to indemnify the agent against the consequences of all acts done by him in due execution of the authority conferred upon him. When, in obeying the orders of or performing duties for his principal in good faith, the agent incurs expense or liability, or is compelled to pay damages to third parties, the principal is bound to indemnify and reimburse him. Story on Agency, Sec. 339; D'Arcy v. Lyle, 1 Am. Leading Cases; Hare & Wallace, *p. 711; 5 Binney (Pa.), p. 441; Stocking v. Sage, 1 Conn. 519; Greene v. Goddard, 9 Metcalf (Mass.), 213-222; Powell v. Trustees of Newburgh, 19 Johns. p. 284; Howe v. R. R. Co., 37 N. Y. p. 297; Frixione v. Tagliaferro, 34 Eng. Law and Eq. 27.

The general doctrine is stated in the section cited from Story on Agency, and finds ample illustration in the cases cited.

In D'Arcy v. Lyle, the plaintiff as agent of defendant had recovered by judicial process, at St. Domingo, certain goods owned by defendant, which he had then sold, duly remitted the proceeds and closed his agency. Subsequently by a tyrannical and arbitrary exercise of the despotic power of the President of Hayti, under grave peril threatened against the court, the plaintiff and his attorney, the plaintiff was compelled to refund the value of the goods to a third party who had originally claimed an attachment lien upon them. To cover the amount so paid the suit was brought.

The court say, among other things: "The defendant appointed the plaintiff his attorney to settle and collect a debt in a barbarous foreign country. The plaintiff has transacted

that business with fidelity and care and remitted the proceeds to his principal. He risked his life in defense of the interests of his constituent, under the imperious mandate of a capricious tyrant holding the reins of government. He has since been compelled, by a mockery of justice, to pay his own moneys for acts lawfully done in the faithful discharge of his duties as an agent, and I have no difficulty in saying that of two innocent persons, the principal and not the agent should sustain the loss."

From *Greene v. Goddard*, 9 Met. 212, we cite: "Where an agent, in pursuing the instructions of his principal and acting within the scope of his authority, becomes personally liable for the performance of the contract he makes for his principal, and without which personal liability the orders of the principal can not be executed at all, or not so well executed, and this is known by the principal at the time of giving his instructions and creating the agency, if a loss occur to the agent, it is most clear that he can look to the principal for indemnity for the damage sustained by him.

Two other most instructive and pertinent cases are the following:

Howe v. R. R. Co. was a case where a railroad conductor, acting in obedience to orders from the company, refused to accept from a passenger a certain ticket, and, on the passenger's refusing to pay fare, stopped the train and put him off. The passenger sued the conductor and recovered a judgment which, after being arrested on a *ca. sa.*, the conductor, Howe, settled and brought suit against the railroad company for reimbursement. The company had employed and paid attorneys and counsel to defend the suit against the conductor but declined to pay the judgment. The court say:

"Whether the judgment recovered against him (Howe) was right or wrong, is a question which does not arise on the present appeal. If it was right, the defendant (the railroad company) should have paid it, without exposing him to imprisonment for an act done in good faith, in the interest and by the orders of the company. If it was wrong, the error should have been corrected by a review of the judgment.

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The appellant chose to abandon the defense, and permit him to be the sufferer. The court below was right in holding that he was entitled to redress. There is an implied obligation on the part of the principal to indemnify an innocent agent for obeying his orders, when the act would have been lawful in respect to both, if the principal really had the authority which he claimed. * * * It appeared, presumptively from the record, that the judgment was rendered on the ground that the removal was unlawful."

In *Frixione v. Tagliaferro*, cited in a note to the cases of *D'Arcy v. Lyle*, and *Bradford v. Kimberly*, 1 Am. L. Cases, Hare & Wallace, 5 Ed., top page 869, a case where an agent was suing to recover indemnity for a judgment recovered against him in defense, the court say, as there reported:

"It matters not whether the judicial sentence under which an agent be made to pay be right or wrong; if the agent has hereby sustained a loss on behalf of his principals, they must bear the loss. All that he need show is that the loss arose from the fact of the agency, that he was acting within the scope of his authority, and that the damage was not attributable to any fault of his own. Neither is it important that he exceeded in his instructions if the excess was expressly waived by his principal."

A principal can not adopt a part of the agent's act without adopting all, and by accepting the benefits, he ratifies the act and adopts as his own all the means and instrumentalities resorted to by the agent in acquiring them. And when it is claimed by the principal that the agent transcended his authority, if he do not promptly repudiate the act on being informed of it, he will be held to have ratified it by implication. *Farmers Loan and Trust Co. v. Walworth*, 1 N. Y. 433; *Crans v. Hunter*, 28 N. Y. 389; *Fowler v. Gold Exch. Bank*, 67 N. Y. 138; *Searing v. Butler*, 69 Ill. 575.

The case of *Fowler v. Bank* was one presenting questions similar to those which might have arisen if Tenney had retained in his hands the property of the Jeffery Printing Company, claiming indemnity therefrom for his losses and expenses, and the bank were endeavoring to compel him to

pay the amount of its claim. The court, after showing that the only claim which the plaintiff in that case had to the money in controversy, rested upon the fact that in the transactions which produced it, defendant acted as its agent, sustained the right of defendant to indemnity and laid down the rule in such cases substantially as we have stated it in the first clause of our proposition.

WATERMAN, P. J. One of the primary rules of the law of principal and agent, is that the principal is bound to indemnify the agent against the consequences of all lawful acts by him *bona fide* done in pursuance of the authority conferred. Evans' Newell on Agency, 353; Meechem on Agency, Sec. 653; Story on Agency, Sec. 339; Stocking v. Sage, 1 Conn. 519; Greene v. Goddard, 9 Metcalf, 212-222; Perry on Trusts, Sec. 910.

Counsel for appellant do not contest the existence of this rule; their position is that the judgment against Tenney was rendered, not because of his relation to, or anything he did for, the bank, but on account of his being the attorney of Mrs. Jeffery, and the opinion entertained by the chancellor that he was the attorney of Mr. Jeffery. Counsel say: "The conspiracy which Judge Tuley thought he saw, was a Jeffery affair, not a bank affair." "Judge Tuley thought he saw a group of conspirators at work." "The bank was not there. Jeffery, Mrs. Jeffery, Pomeroy and representatives of the W. O. Tyler Paper Company were all there; and Tenney was there too, helping the others, who were his clients. The group was really innocently engaged, but Judge Tuley denounced them all as wicked plotters, and they suffered in consequence. Why does Tenney demand that the bank shall indemnify him for this?"

Counsel also say that Tenney and others were suspected of a fraudulent conspiracy and consequently were punished together; that the bank was neither suspected nor punished. The decree hardly sustains this view. The decree found that the material allegations of the supplemental bill were sustained by the evidence. The supplemental bill alleges that in

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the proceedings for the formation of the Jeffery Printing Company (the new company) when it became necessary to procure subscriptions for the \$150,000 capital stock, Lyman J. Gage, vice-president of the bank, with intent to aid in the consummation of the fraudulent scheme aforesaid (*i. e.*, to wreck the John B. Jeffery Printing Company and defraud its creditors), entered, or pretended to have entered, upon the books of the bank a credit or credits as for sums of money to the aggregate amount of \$150,000, etc.; and further alleges that the whole scheme and transaction (the formation of the new company) from beginning to end was part of the fraudulent schemes contrived as aforesaid by John B. and Emma Jeffery and Daniel K. Tenney, each of the persons participating in these transactions having full knowledge and notice of the fraudulent scheme.

If the Circuit Court, in the decree by it rendered, had been content to merely speak of Tenney as a conspirator who had joined with Jeffery in the perpetration of what the court thought a fraudulent transaction, and had rendered no decree against him, Tenney could not have required the bank to remove the stigma from his name or pay damages for his injured reputation. The indemnity which a principal is bound to afford an agent, does not extend to giving compensation for odium he may incur, or unjust things said concerning his conduct in transacting the business he has been set to do.

The Circuit Court, however, did not stop with merely characterizing Tenney's conduct; it decreed that within thirty days he pay to the receiver it had appointed, the sum of \$25,370.50, as being the part of the \$75,000 bid by him upon the tangible assets of the John B. Jeffery Printing Co., which (in the language of the decree) "he pretended to apply on the above mentioned judgment in his own favor," with interest at six per cent per annum, "amounting, principal and interest, to \$29,383.64."

The judgment alluded to was that of the bank; there was no pretense about applying the \$25,307.50 on that judgment; he actually did so apply it with the knowledge of and by arrangement with the bank. It was to obtain relief from this decree,

which became at once a lien upon his realty in Cook county, under which his personal property might have been seized and sold and by which his personal freedom was endangered (National Park Bank v. Halle, 41 Ill. App. 19), that he prosecuted an appeal. The court, concluding that he was a conspirator, did not decree that he make good whatever the complainants had lost by reason of his acts as such, or order him to pay what Mrs. Jeffery or any of his clients, save the bank, had obtained upon the judgments, by them, through his instrumentality, entered. He was held bound to pay simply what the bank, through him as its attorney and trustee, had received. It is clear, therefore, that because of his connection with and agency for the bank, this personal decree was entered against him. Thus held, the bank was bound to indemnify him.

It may be true, as is urged, that the bank had no need for his services; that its security was so ample and its position so secure that it could have done without his aid. The rule is not, as would seem to be suggested, that a principal is bound to indemnify only such agents as he necessarily employs, or for such acts as they necessarily do in his service; he is bound to indemnify whatever agents he sees fit to employ, for all authorized and lawful acts, *bona fide* done in his business.

It is, therefore, quite immaterial if Tenney, as the attorney of Mrs. Jeffery, had more occasion to apply to the bank than the bank had to employ him, or that none of its interests demanded that its judgment should be entered in his name; it did employ him; it did authorize the entry of its judgment in his name; it did empower him to purchase the tangible assets as its trustee and to cancel its judgment by such purchase, and finally it received from him such assets and actively participated in the creation of a new corporation to which these assets were transferred. Tenney was held for the very amount it, through his agency, received, and it can not be permitted to now say that it never needed to employ him at all.

This conclusion is not reached, solely because this court set aside the decree of the Circuit Court, although the fact that such reversal inured to the benefit of the bank, and it

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enjoys the fruits of the appeal Tenney prosecuted, is entitled to consideration. The right of an agent to indemnity for *bona fide*, lawful, authorized acts, is the same as against those which bring no fruit to the principal or cause him loss, as against those from which he receives a rich reward. The question here presented is not how the Circuit Court regarded what Tenney did for the bank, but were such acts lawful, authorized, done in good faith. It is urged that a principal has the right to take the consequences of a decree against its agent for acts done in its behalf, and is not bound to appeal therefrom, and that this action, being for the costs and expenses of the agent's appeal, must fail.

The principal is not bound to appeal from a decree rendered against his agent; he may submit to it, but he is bound to indemnify his agent, and this means something more than that after the agent has paid the judgment, or under it been stripped of his goods by due process of law, that the principal will then afford remuneration. The principal may pay if he will, but he can not lie supinely by and let his agent suffer the consequences of a decree which he, as principal, is legally and morally bound to pay. Neither is the agent bound to wait indefinitely before he takes measures to protect himself; having notified, if practicable, the principal of the situation, he may proceed to measures for his own and his principal's relief, measures which in the case of an appeal taken, are necessarily in the interest of the principal and tend to his exoneration. When sued for an act done in pursuance of his employment, he is not obliged to let judgment go against him, but may defend and recover the expenses of a defense *bona fide* made. *Howe v. Buffalo, N. Y. & Erie R. R. Co.*, 37 N. Y. 297; *Stocking v. Sage*, 11 Conn. 519-522; *Maitland v. Martin*, 86 Penn. St. 120; *Frixione v. Tagliaferro*, 34 L. & Eq. 27; *Powell v. Trustees of Newburgh*, 19 Johns. 283; *Saveland v. Green*, 36 Wis. 612-617.

In the present case, by virtue of the statutes of this State, Sec. 1, Chap. 77, all the real estate Tenney had in the county of Cook was fastened upon by the decree of the court. The obligation of the bank and the right of Tenney were clear.

He proceeded by appeal to remove the decree and thus relieved the bank from its obligation to pay; for his proper and reasonable costs, expenses and services in so doing he is entitled to be remunerated. No complaint is made as to the amount of the judgment rendered in this case, and it will be affirmed.

Judgment affirmed.

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77	18

MOSES F. RITTENHOUSE AND JESSE R. EMBREE

V.

D. F. SABLE ET AL.

Mechanic's Liens—Delay—Loss of Lien by.

It appearing upon the face of a bill, asserting a mechanic's lien, that complainants had delayed filing the same beyond the statutory period, and nothing appearing to excuse such delay, a demurrer to the bill was properly sustained.

[Opinion filed January 14, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Appellants, January 17, 1891, filed their bill in the court below, setting forth that on or about April 24, 1890, one D. F. Sable had the contract or was about to erect a building for one Aaron S. Berkowsky upon certain real estate in Cook county, and that appellants entered into a verbal agreement with the said Sable to furnish building material for the construction of said building; that the contract was for no specific amount, but for such material as should, from time to time, be ordered by said Sable, the prices to be reasonable, and that appellants were to be paid as the work progressed upon the building, and in full within thirty days after the last delivery by them; that they commenced delivering building

material about April 24, 1890, and so continued until about August 11, 1890, when the last bill was delivered, and that said building was to be finished on or before the first day of December, 1890; that on July 24, 1890, they caused a mechanic's lien notice to be served on said Berkowsky; and on October 20, 1890, they filed with the clerk of the Circuit Court of Cook County, a claim of lien in accordance with the statute, and that thereupon the said clerk made the proper entries thereof, as was his duty, and in accordance with the law; that the said Sable, upon the request of the said Berkowsky, made divers sworn statements in obedience to, and in accordance with the statute in such cases made and provided, and that the said Berkowsky, as was his duty to do, has retained in his hands the sum of \$3,800, which money is equitably due and payable to the persons who furnished labor and material for the said building, as their respective rights shall appear; and that the said sum should be held as a trust fund for the payment of all persons who furnished labor and material for said building; but appellants show that the said Berkowsky, conspiring with the said Sable, refuses to settle and distribute the funds, and denies that appellants have any right to a mechanic's lien on said building, on the ground that said Sable & Co. were not original contractors; and the said Berkowsky claims that Johnson and Beilman were the original contractors, and that Sable was a sub-contractor, which claim, appellants insist, is a scheme to confuse them and cheat and defraud them and other persons in like circumstances with them, out of their pay for furnishing labor and materials for said building, and that appellants have no means of knowing how the accounts of said Berkowsky, with said Sable, Johnson and Bielman and other persons who furnished labor and materials for said building, stand. Appellants therefore bring this bill, and pray that an account may be taken, under the direction of the court, and that they may be decreed to have a lien upon said premises for the amount due them, and that if the court shall find that they are not entitled to a lien upon the premises, that whatever sum may, on an accounting, be found to be in the hands of, or under the control of

Berkowsky, due the contractors for and on account of the said building, may be decreed to be a trust fund for the use and benefit of all persons who furnished labor and materials used in and upon said building, and that the said Berkowsky may be ordered to pay the same, according to the respective rights of such persons.

A demurrer to the bill was sustained, and the complainants bring this appeal.

Messrs. H. C. BENNETT and W. A. PHELPS, for appellants.

Messrs. WEIGLEY, BULKLEY & GRAY, for Aaron S. Berkowsky and Mary F. Berkowsky.

WATERMAN, P. J. There is nothing in this petition to show when the amount to be paid Sable, who is alleged to have been the original contractor, became due. It may be inferred that he was not to be fully paid for all done by him until he finished the building, which it is alleged he was to do "on or before the first day of December, 1890;" but when the building was finished is not shown. There is, therefore, nothing shown to excuse the delay in filing the petition, of more than four months from the time the claim was due. The case falls under the provisions of Sec. 47 of the law covering liens. If appellants have lost their lien on the premises, they have lost all claim upon the owner. Whatever sum is unpaid upon the original contract belongs to the original contractor, subject to the claims of those entitled to liens under and by virtue of such contract, of whom appellants are not. Sable & Co., owing appellants, may be sued by them, and when a judgment has been obtained against those indebted to appellants, they may proceed against all persons owing their debtors. It is a mistake to assume that whatever may be due under the original contract is a fund held or chargeable in any way with a trust for the benefit of appellants.

The decree of the Superior Court dismissing the bill is affirmed.

Decree affirmed.

Bigelow v. Chapman.

AMORY BIGELOW

v.

A. B. CHAPMAN.

Contracts—Alleged Breach of—Whether Defendant Excused from Performance.

Upon the case presented, this court holds that the defendant was justified in treating the contract upon which the action was brought as terminated by the act of plaintiff's representative.

[Opinion filed January 14, 1892.]

APPEAL from the Circuit Court of Cook County; the Hon. S. P. McCONNELL, Judge, presiding.

Messrs. EDWARD W. RUSSELL and DENEEN & McEWEN, for appellant.

Messrs. J. S. HUEY and J. W. LANEHART, for appellee.

WATERMAN, P. J. This case grows out of a purchase by appellant from appellee in California of five car loads of oranges. When one car had been loaded and the work of loading the others was going on, appellee, from whom the fruit was purchased, received from Sleavin & Broderick of Minneapolis, to whom the oranges were to be shipped, a telegram saying:

“Advise holding shipment for few days. Afraid of strike on road.”

Upon receipt of this appellee shipped the loaded car and the others, as soon as loaded, elsewhere, and sold all the fruit to other parties. For this appellant claimed damages. There was evidence that the fruit was in a condition which made its immediate sale necessary. There was also evidence that appellee was told by appellant that the fruit was purchased to fill an order made by Sleavin & Broderick, and that their direc-

tious as to its shipment were to be respected. The finding of the court below being for appellee, it must be taken that the court found that appellee was justified in selling and shipping the fruit to other parties. We see no sufficient reason for interfering with its conclusions in this regard. Under the evidence it can fairly be said that the telegram gave to appellee an election to treat the contract as at an end, or to dispose of the fruit as best he could for the use of appellant, paying to him whatever profit was made and holding him for any loss. What he did realize is not shown, and he claims nothing from appellant on account of the sale. He evidently treated the sale as at an end. If the court had found for appellant, some of the propositions of law, refused, might have been relevant upon the question of damages. Coming to the conclusion it did, we think that all the propositions were properly refused.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

DANIEL H. TOLMAN

V.

JAMES H. SMITH ET AL.

Sales—Shares of Stock—Fraud by Vendor—Remedy of Vendee.

1. Where persons named alleged that they had been induced to purchase stock of another by his fraudulent representations, he can not be heard to say that the duty rested on them to suspect his veracity and that, therefore, their delay in finding out the fraud excuses it.

2. If the president of a bank, occupying a *quasi* fiduciary relation to his general customers, by deceit induces one of them to buy from him shares of stock at double their value, and retains them himself as security for a portion of the price unpaid, that customer may, by an action on the case, if not for money had and received, have the portion paid refunded.

[Opinion filed January 14, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding.

Tolman v. Smith.

Mr. JOHN G. HENDERSON, for appellant.

Messrs. HOFHEIMER & ZEISLER, for appellees.

GARY, J. On the 10th day of September, 1886, the appellant being the president, and the appellees customers, of the Chicago Trust and Savings Bank, the former sold to the latter twenty shares of stock in it, at the price of \$125 per share. The par was one hundred. They paid him \$500 and gave their judgment note for the residue of the price, \$2,000, reciting in it the pledge of the stock which was retained by the appellant as collateral security, with power to sell it on default of payment. The appellees paid interest on the note to April 1, 1890, and on May 3, 1890, filed a bill in chancery to rescind the purchase. Forthwith the appellant sold the stock held as collateral, for \$1,500, and entered judgment on the note for \$536 and costs. On the application of the appellees that judgment was set aside, and they, by notice under Sec. 29 of the Practice Act of 1872, set up that they were induced to purchase the stock by false and fraudulent representations made by appellant; that the consideration for the note and the \$500 that they had paid had failed, and asking judgment in their favor for the damages they had sustained. That notice occupies four, and the evidence *pro* and *con*, thirty-seven pages of the printed abstract, each containing more matter than a page of this volume. Eighteen instructions offered by the appellant were given and eight refused, and his argument fills forty pages. It is plain that no complete and exhaustive review of this case can be made in an opinion of justifiable length. The real issue was that presented by an instruction for appellees as follows:

“And if you believe, from the evidence in the case, that the plaintiff, D. H. Tolman, sold to the defendants twenty shares of the capital stock of the Chicago Trust and Savings Bank, at the price of \$125 per share, that said defendants in consideration thereof paid \$500 and made the note sued on for the balance, and that said Tolman, for the purpose of inducing said defendants to buy said stock, made to said defendants

fraudulent representations of material facts concerning said stock, which representations when made were false in material respects to the knowledge of the plaintiff, and that the defendants, believing them to be true, and relying upon the truth of the same, purchased said stock for the consideration above stated, then you are instructed to find the issues for the defendants, and assess their damages at the sum of \$500, with interest at six per cent per annum from the 10th of September, 1886, to the present date."

It must be borne in mind that the appellees had never had possession of the stock certificates; the appellant had kept and disposed of them, so that there was nothing for the appellees to restore, or to account for the value of.

The negotiations between the parties began through the receipt by the appellees of a letter as follows:

"CHICAGO, Aug. 28th, 1886.

MESSRS. SMITH & PATTISSON. Gentlemen:—It has been decided at a meeting of the stockholders to increase the capital stock of this bank to \$500,000. A limited amount of stock is offered at \$125, and will be allotted according to receipt of subscription or proportionately to the whole amount of subscription received. As we have earned upward of \$50,000 the first fifteen months, besides paying five per cent cash dividend the first six months, and three per cent quarterly since, I can recommend this investment as being one of the best purchases ever offered. We can pay handsome quarterly dividends, build up a surplus quickly, and the stock will materially advance in price.

Awaiting your advice, I am yours truly,

D. H. TOLMAN & Co."

By adding an earned surplus of \$50,000 to the original capital of \$250,000, and doubling the stock, the new stock was paid up only sixty per cent, and the principal contest is whether or not the appellant told the appellees that the stock was fully paid.

The appellees were not subscribers to the bank for shares of stock, but buyers from the appellant. If he made to them "fraudulent representations of material facts," they were that

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the stock was fully paid. No attempt is made to prove any other. As a witness in his own behalf, the appellant went beyond the transaction with the appellees, and said that he made no such statement to anybody. Although irrelevant, this assertion opened the door for the appellees to put in testimony contradicting it by a witness who had also bought fifty shares from the appellant, the necessary effect of which was corroborative in the minds of jurors of the testimony of the appellees themselves. *Stolp v. Blair*, 68 Ill. 541; *Blewett v. Tregonning*, 3 Ad. & El. 554; 1 Ph. Ev., Cow. & Hill, 617.

In addition to this testimony the record shows that the books of the bank, by a fiction, represented the stock as full paid; that is, the real \$50,000 of surplus was credited to the capital stock account, making with the original capital \$300,000, and then \$200,000 more was credited to the account and charged to "subscription dividends," which is merely another name for what the street calls water. But little corroboration was needed to induce belief that some peculiar inducement must have been presented by the vendor of shares which he knew all about, to induce an ignorant purchaser to buy them at double their value, if that value were to be measured by the value of the tangible assets of the bank. Nor can the appellant be heard to say that any duty rested upon the appellees to suspect his veracity, either at the time of the sale, or any other time, and therefore the delay in finding out, excuses the deceit. We can not review the many cases cited.

It needs but little knowledge of law to reach the conclusion that if the president of a bank, occupying a *quasi* fiduciary relation to his general customers, by deceit induces one of them to buy from him shares at double their value, and retains them himself as security for the portion of the price unpaid, that customer may, by an action on the case, if not for money had and received, have the portion paid refunded; and in effect that is what has been done in this case on the notice.

Whether the deceit was perpetrated, was a question for the jury. The evidence is such that a court has no authority to declare it insufficient; the appellant has had a fair trial; and the judgment is affirmed.

Judgment affirmed.

CALUMET PAPER COMPANY
V.
KNIGHT & LEONARD COMPANY.

Replevin—Justification of Sheriff under Execution—When Judgment Must Be Shown—Chattel Mortgages—Practice.

1. Where no plea of *null tiel* corporation has been filed, it is not necessary for a plaintiff corporation to make proof of its existence.

2. It is not necessary for plaintiff, in an action based on a chattel mortgage, to prove that, at the acknowledgment of the mortgage, the justice made the entry in his docket required by the statute.

3. It was discretionary with the court in the case presented to refuse, at the close of the plaintiff's case, to allow the defendant to file a plea of justification.

4. Where a sheriff, being the defendant in an action of replevin, justifies under an execution, and desires to show that the claim of the plaintiff (who is not the defendant in the execution) is fraudulent as to creditors, he must show a valid judgment as well as an execution thereon issued.

[Opinion filed January 14, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

In May, 1889, the Charles J. Johnson & Co. Company was indebted to appellant to the amount of about \$1,200, and appellant was pressing for payment. Johnson was also indebted to other creditors, among them, appellee, to whom Johnson & Co. was owing \$903.39 for rent and press work. For this a ninety-day note was given to appellee on May 15th. About May 18th a levy was made on the property of Johnson & Co., in favor of Marder, Luse & Co., to the amount of \$400, which amount appellee paid and took from Johnson & Co. a sixty-day note for \$400, dated May 18th. Upon the same day, May 18th, Johnson & Co. gave appellee a note for \$2,500 due two years after date, and a chattel mortgage on its printing office to secure the same. On May 22d an execution for over \$1,200, in favor of appellant and against Johnson &

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Co., was levied on the goods in the printing office of Johnson & Co., being the same chattels described in the mortgage by it given to appellee. Thereupon appellee brought an action of replevin against the sheriff and appellant.

Upon the trial appellee introduced no evidence except the execution issued upon its judgment, and the return of the sheriff showing the levy he made on the property of Johnson & Co. by virtue thereof, and that on June 1st the coroner of Cook county, by virtue of a writ of replevin, took the property so levied upon away from him, the sheriff. Appellee, at the same time, asked leave to file a special plea of justification by the sheriff, under the said judgment and execution in favor of appellee, which plea of justification the court refused to allow appellee to file, it not having been offered until after the plaintiff had closed its case.

There was a finding and judgment for the plaintiff, from which the defendant, the Calumet Paper Company, appealed.

Messrs. E. F. RUNYAN and SAMUEL S. PARKS, for appellant.

Messrs. GURLEY & WOOD, for appellee.

WATERMAN, P. J. No plea of *nul tiel* corporation having been filed, it was not necessary that the plaintiff below make proof of its corporate existence. Nor was it necessary that the plaintiff should show that at the acknowledgment of the mortgage, the justice made the entry in his docket, which, by the statute, it was his duty to make. Harlow v. Berger, 30 Ill. 425.

It was clearly proven that at the time of the making of the mortgage Johnson & Co. were already indebted to appellee to an amount exceeding \$1,300. The Johnson & Co. Company was also liable to appellee for rent that would accrue upon a lease that had then a considerable time to run, and was likely to become further indebted to appellee for a lot of press work appellee had just started to do for Johnson & Co. The consideration for the mortgage and that it was executed to secure a large amount of *bona fide* indebtedness, was fully established.

There was no error in the court's exercising its discretion as it did in refusing to allow the defendants to file, at the conclusion of the plaintiff's case, a plea of justification. Appellant's plea, if filed, would not have been sustained by the evidence; appellant did not offer to show any judgment upon which the execution under which the sheriff sought to justify, was issued, or offer anything save the mere writ and return thereon.

Where a sheriff, being the defendant in an action of replevin, justifies under an execution, and desires to show that the claim of the plaintiff is fraudulent as to creditors, he must show a valid judgment as well as an execution thereon issued. This is not the case where the plaintiff in the action of replevin is the defendant in the execution upon which the sheriff acted and under which he seeks to justify. In such case, the execution itself is a sufficient justification for a seizure of the goods of the defendant in the execution (plaintiff in the action of replevin) where the seizure is only of such goods as are, by law, liable to be taken upon execution. *Dayton v. Fry*, 29 Ill. 526; *Johnson v. Holloway*, 82 Ill. 334; *Jackson v. Hobson*, 4 Scam. 411; *Hartman v. Cochrane*, 2 Ill. App. 592; *Sandford Mfg. Co. v. Wiggin*, 14 N. H. 441; *Ambler v. Traver*, 2 Ill. App. 614.

The judgment of the Superior Court is affirmed.

Judgment affirmed.

E. R. WALKER

V.

ABRAHAM BERNSTEIN.

Replevin—Evidence—Identity of Goods—Value of, Expert Testimony—Instructions—Immaterial Error.

It was not error in the case presented for the court to allow certain witnesses, who were shown to have had experience in dealing in second-hand furniture, to give an opinion as to the value of such goods without having seen them, upon the assumption that they had been truly described as to their general condition and appearance by other witnesses. The objection to such testimony goes to its weight and not to its competence.

Walker v. Bernstein.

[Opinion filed January 14, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding.

Mr. JOHN C. SCOVEL, for appellant.

Messrs. BLUM & BLUM, for appellee.

MORAN, J. This was an action of replevin, with a count in trover for value of goods not recovered on the trial. The evidence tended to show that appellant took the goods that appellee had sold to one Lizzie Williams, and on which he held a mortgage for the purchase money. Appellant claimed and introduced evidence tending to show that the goods he took were not those sold by appellee, but were goods which were mortgaged to appellant by mortgages made before the sale of any goods from appellee to said Lizzie Williams. The question as to the identity of the goods was left to the jury under proper instructions and their verdict settled that issue.

It is contended that the verdict is excessive. There was very conflicting evidence as to the value of the goods when taken, and it was a question for the jury to determine from the evidence as best they could what the value of the goods was.

It is contended that the court admitted improper evidence on the question of value. The court allowed certain witnesses who were shown to have experience in dealing in second-hand furniture and household goods to give an opinion as to the value of the goods without having seen them, upon the assumption that they were truly described as to their general condition and appearance by others of appellee's witnesses. This was competent. Of course, such evidence may not be as satisfactory or convincing as to the value as that of valuers who had seen the goods, but the objection is to the weight of such evidence and not to its competence. It is quite usual to admit the evidence of experts in values on a hypothetical assumption as to the age, condition of repair, etc., of the articles.

It is very clear that if the jury in this case found that the description of the furniture in question given by appellant's witnesses was the correct one, they could not have allowed so large a value for it. They must have believed appellee's evidence as to the number and quality of the articles, and their general condition, and rejected appellant's description. This they were at liberty to do, and they were manifestly the most competent tribunal to decide which was the correct estimate from all the testimony before them. We are unable to say that the verdict as to the value of the goods is not fairly supported by the evidence, and we are clear that there was no error in the admission of the evidence objected to.

The fifth instruction given for appellee is objected to because it told the jury to take the testimony of Lizzie Williams as to the amount due on the mortgage that appellant held and under which he claimed the goods. This instruction should not have been given, but the error in giving did not affect appellant. The contest was over the identity of the goods. Each party claimed that the goods taken were the goods covered by his mortgage, and neither claimed any right in the goods in fact covered by the other's mortgage. The question was whether the goods appellant seized and took away were the ones described and covered by his mortgage, and not what was due upon his mortgage, and so the court told the jury in appellant's first instruction that it was not material in the case for him to prove that any sum was due under his mortgage, "as it is not claimed in this case by the plaintiff that he had any lien upon the property named in said mortgage." The instruction complained of, therefore, had no influence upon the result, and the error in giving it does not compel a reversal.

There is no error in the record available to appellant and the judgment will therefore be affirmed.

Judgment affirmed.

Poppers v. Peterson.

GEORGE S. POPPERS
V.
JOSEPH H. PETERSON.

Evidence—Cross-examination—Res Gestæ—Instructions.

Where a witness had testified that he signed a certain instrument without reading it, it is proper, upon cross-examination, to inquire as to his previous business, for the purpose of showing that he was a man of experience and affairs.

[Opinion filed January 14, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Mr. JOHN P. AHRENS, for appellant.

Mr. J. MCKENZIE CLELAND, for appellee.

GARY, J. The general character of this case sufficiently appears in the report of it on a former appeal. 33 Ill. App. 384.

On this trial, however, the appellee testified that folding beds were taken as payment of all indebtedness from appellee to appellant, while the appellant testified that he paid the appellee \$500 cash, and took as his own the folding beds and property here in controversy, and canceled the indebtedness of the appellee. In support of that position the appellant put in evidence a paper admitted to be signed by the appellee as follows:

“Residence, 192 Honore street, Chicago, Agt. 5th, 1886. Rec. of Geo. S. Poppers one thousand (\$1,000) dollars for thirty-one (31) Peterson beds, finished and not finished; and two dim. ring and 1 gold watch and chain and 1 dim. collar button.

JOS. H. PETERSON.

The appellee testified that he signed that paper without looking at it. The original is in the bill of exceptions brought here. The handwriting is bad, but the words and figures "one thousand (\$1,000) dollars" constitute one line in bold, plain characters.

On cross-examination of the appellee he was asked as to his former business, and the court said: "It don't make any difference what he has been in;" to which counsel replied: "He claims here that he signed a paper which he did not read. I want to show that he is a man of affairs—a man of experience." To the refusal of the court to permit the cross-examination, the appellant excepted.

The appellee testified that O'Hara returned to him a bill of sale which the appellee had made to O'Hara of the property, and that the appellee delivered it to his wife, who is a sister to O'Hara. The court refused to permit the questions: "Was that by direction of O'Hara?" and, "What did you say to her when you gave it to her?" And the appellant excepted. These exceptions are well taken. The probability that a witness would sign, without looking at a paper, was a question for the jury. It might well be argued to a jury, that a man of business experience had not so signed a paper, of which a prominent line presented to the eye a sum of money which, in the version of the witness, had no place in the transaction. The extent of his business experience was therefore a circumstance material to be known, in judging of his credibility. As to the last two questions, the appellee had testified in effect that O'Hara had surrendered the bill of sale for the purpose of revesting the property, but without being paid. It was not canceled, but put in the custody of the sister of O'Hara, the wife of appellee. If all that O'Hara and appellee said, through which, and acts done under what was so said, that custody began, had come into the case, it might have appeared that O'Hara did not intend to revest the property in the appellee. The first reason given in *Phares v. Barber*, 61 Ill. 271, for holding such an exception well taken is applicable here.

The instructions are not sufficiently guarded in restricting the right of recovery to a demand made by the appellee

Suesemilch v. Suesemilch.

after reconveyance from O'Hara. One instruction for the appellee elaborately explained to the jury how the receipt might be avoided; but in lieu of an instruction asked by the appellant, that if the appellee by the writing did knowingly sell the property to the appellant he should be found not guilty, the court gave this:

“And if the jury shall believe from all the evidence, that said plaintiff sold the property mentioned in the writing offered in evidence to the defendant, and that the said property mentioned was the property of the defendant at the time of the commencement of this suit, then the jury should find the defendant not guilty.”

The appellant had testified that he had sold the jewelry; whether before or after the commencement of the suit he did not say. On the merits it was utterly immaterial what he had done with it, and yet this instruction makes it a condition for a verdict in his favor that he had retained it.

On the whole case the appellant has not had a fair trial on the law or the evidence, and the judgment is reversed and the cause remanded.

Reversed and remanded.

HENRY SUESEMILCH

V.

IDA SUESEMILCH.

Divorce—Construction of Statute—Practice—Witnesses to be Heard in Open Court.

1. An open court is a court formally opened and engaged in the transaction of judicial affairs to which all persons who conduct themselves in an orderly manner are admitted.

2. In a proceeding for divorce, where the defendant fails to appear and the bill is taken as confessed, a divorce can not be had upon the testimony of only one witness, examined in open court, and the deposition of one other witness.

[Opinion filed January 14, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Mr. ARNOLD TRIPP, for appellant.

No appearance for appellee.

WATERMAN, P. J. The only question presented in this case is whether in a proceeding for divorce, where the defendant fails to appear and the bill is taken as confessed, a divorce can be had upon the testimony of only one witness, examined in open court, and the deposition of one other witness.

The statute of this State provides that "if the bill is taken as confessed, the court shall proceed to hear the cause by examination of witnesses in open court." Prior to the revision of the act concerning divorces made in 1874, the statute was, "If the bill or petition shall be taken for confessed, the court may proceed to a hearing of the cause, by examination of witnesses in open court." It is to be presumed that the legislature, in thus making imperative what was before merely permissive, intended to establish a new rule of practice. In England, under the old chancery system the chancellor never heard oral testimony; no witnesses were examined in open court, but his judicial action was entirely based upon the depositions of witnesses reduced to writing. Weeks on Depositions, Sec. 37.

The statute of this State as it existed prior to 1874, permitted, in default divorce cases, the oral examination of witnesses in open court. In 1874 this permission was made a requirement to the extent of requiring that at least more than one witness should be so examined. Not only in common parlance but by text writers and courts is there a recognized distinction between the methods made use of for the examination of witnesses. Witnesses are examined before examiners, before the master, *de bene esse*, in open court. Black's Law Dictionary, title, Examination; Bouvier's Law Dictionary, title, Examination. An open court is a court formally opened and engaged in the transaction of judicial affairs, to which all

Robb v. Anderson.

persons who conduct themselves in an orderly manner are admitted. *Hobert v. Hobert*, 45 Iowa, 501; *Bouvier's Law Dictionary*, title, Open Court.

We do not wish to be understood as indicating that depositions may not also be received. In the present case we pass merely upon the question presented, as stated in this opinion.

The decree of the Superior Court dismissing the bill is affirmed.

Decree affirmed.

JOHN D. ROBB AND ELIZA ROBB

v.

J. C. ANDERSON.

43	575
50	75
43	575
55	181
55	217

Judgments and Decrees—Judgment of Another State—Limitations—Revival of Judgment upon Writ of Sci. Fa.—Return of Nihil.

1. Five years is the period of limitation in this State to an action on the judgment of another State.

2. Judgments by default on returns of *nihil* upon writs of *sci. fa.*, to revive judgments against defendants who had ceased to reside in the States where such judgments were entered, will not support actions against such defendants in another State.

[Opinion filed January 14, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Messrs. CRATTY BROS. & ASHCRAFT, for appellants.

Messrs. C. C. BONNEY and LYMAN M. PAINE, for appellee.

GARY, J. This case was submitted to us for decision at the October term, 1890, but the determination of it has been deferred, awaiting the reconsideration by the Supreme Court of the question whether five years is the period of limitation

upon the judgment of another State. That question has now been again decided in the affirmative in *Ambler v. Whipple*, 28 N. E. 841, on appeal from this court. It is reported here in 37 Ill. App. 22.

On the 7th of December, 1875, the appellants recovered against the appellee a judgment in the Court of Common Pleas in Allegheny County, Pennsylvania, for the sum of \$2,212.93. It is only by comity that the record produced can be said to be the record of judgment. The operative words are, "Dec. 7th, 1885, judgment against defendant in default *sec. reg.* for twenty-two hundred and twelve and ninety-three one-hundredths dollars (\$2,212.93)."

Such a record of a court in this State would hardly pass as a judgment. *Martin v. Barnhardt*, 39 Ill. 9; *Faulk v. Kellums*, 54 Ill. 188.

The appellee came to this State in 1877, and has from that time continued to reside here. On the 19th of May, 1885, after returns of *nihil* on three writs of *scire facias*, another entry on the record of the Court of Common Pleas is: "Judgment against defendant in default *sec. reg.* for three thousand one hundred and sixty-five and thirty-five one hundredths dollars (\$3,165.35)."

It appears to be at least the occasional practice in Pennsylvania, to enter upon a *sci. fa.* to revive a judgment, what is there called a judgment *quod recuperet*, instead of that the plaintiff have execution, as in other jurisdictions. *Yates' Pl.* 646; 2 *Harris, Ent.* 361.

It is not necessary to state the pleadings at length. The plea of five years limitation is a bar to the judgment of 1875, and the judgment of 1885 has no effect out of the State of Pennsylvania.

To the latter point in principle, *Warren v. McCarthy*, 25 Ill. 83, applies, and the identical question has been decided in *Hepler v. Davis*, 49 N. W. (Neb.) 458, and in *Weaver v. Boggs*, 38 Md. 255, the latter of which cases is cited as authority in *Grover v. Radcliffe*, 137 U. S. 287. Without searching for other authority, the decisions of the Supreme Courts of Maryland and Nebraska, that judgments by default on returns

Small v. Roberts.

of *nihil*, upon writs of *sci. fa.* to revive judgments against defendants who had ceased to reside in the States where such judgments were entered, would not support actions against such defendants in another State, and the approval of that doctrine by the Supreme Court of the United States warrants us in adopting it, and affirming the judgment of the Superior Court which followed it.

Judgment affirmed.

MATTHEW SMALL
v.
FRANCIS E. ROBERTS.

Contract—Sale—Bailment—Instructions.

1. The question of whether the treatment of a horse in the hands of a given person was such as a careful, prudent man would exercise in the care of his own horse is a question of fact for the jury in a given case.

2. Objection to an instruction on the ground that it contained an assumption of a disputed fact, held to have been cured by a previous paragraph of the instructions in the case presented.

[Opinion filed January 14, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding.

Messrs. HANEY & MERRICK, for appellant.

Mr. T. H. HOOD, for appellee.

MORAN, J. This action was brought to recover for a horse alleged to have been sold by appellant to appellee. Appellee's defense was that he did not buy the horse but took him on trial, to be purchased if found to be satisfactory, and that while trying him and using him with proper care and prudence the horse suddenly died. The jury, under instructions

that stated the principles of law applicable to the case fully and correctly, found a verdict for the defendant. There was a flat contradiction between the witnesses on the question of whether the horse was sold absolutely or delivered on trial, and a verdict either way on that issue could not be disturbed in this court upon the evidence in the record. On the question of the treatment of the horse by appellee, there was no conflict, and it was for the jury to say whether the manner of his treatment as detailed was such as a careful and prudent man would exercise in the care of his own horse. Complaint is made of the last instruction for the defendant given to the jury by the court on the ground that it assumes that the horse was given to the defendant for trial. The last paragraph of the instruction for the defendant if read by itself is liable to appellant's criticism. But if read with the paragraph which immediately precedes it, the objection is cured. The whole instruction is as follows:

“If the jury believe from the evidence in this case that the plaintiff, Small, gave the defendant, Roberts, an option to purchase the horse in question if he liked it, and if you further believe from the evidence that the defendant, Roberts, received such horse from said Small for the purpose of making such trial, then such transaction constituted a bailment and not a sale, and so imposed on the defendant, Roberts, only the duty of ordinary care in keeping and returning the horse.

“The court further instructs the jury, that if they believe from the evidence that the defendant, Roberts, and his agent or agents, exercised ordinary care in the use of such horse while on such trial (ordinary care meaning such care as an ordinarily prudent man would give to his own horse under such circumstances) and if the death of the horse resulted, then the defendant, Roberts, is not liable for the value of the horse while in his control for the purpose of making such trial.”

It is very clear that both paragraphs constitute but one instruction. The omission of the conjunction “and” between the two gives rise to a trifling ambiguity which disappears when the words are all considered.

Travis v. Pierson.

In our opinion there is in fact no assumption in the instruction, and no tendency to mislead, and in view of all the instructions given to the jury we are satisfied there was no error made.

The judgment must be affirmed.

Judgment affirmed.

EZRA J. TRAVIS

V.

JOHN PIERSON.

Streets and Alleys—Collision in Street—Measure of Damages—Evidence.

1. In cases of collision in a street the innocent party is entitled to recover from the wrong-doer what it is reasonably necessary for him to pay, and he does pay, in order to repair the damage done, and also a reasonable sum for the loss of the use of his carriage while he is necessarily deprived thereof.

2. What one has actually paid for repairs is, in the absence of anything to indicate bad faith, admissible in evidence to show what the reasonable cost of such repairs is.

[Opinion filed January 14, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Mr. NELSON MONROE, for appellant.

Messrs. E. F. ALLEN and HAMPDEN KELSEY, for appellee.

WATERMAN, P. J. This case arose out of a collision between two vehicles on a street in the city of Chicago. We see no sufficient reason for interfering with the conclusion of the court below as to who was to blame for the collision.

In cases of collision the innocent party is entitled to recover from the wrong-doer what it is reasonably necessary for him to pay, and he does pay, in order to repair the damage done,

and also a reasonable sum for the loss of the use of his carriage while he is necessarily deprived of its use. *Heard v. Holman*, 115 E. C. Law, 1-9; *The Atlas*, 3 Otto, 302; *The United States*, 3 Wallace, 310; *Jolly v. Terre Haute Bridge Co.*, 6 McLean, 238; *Williamson et al. v. Barrett et al.*, 13 Howard (U. S.), 101.

In ordinary business transactions, nothing appearing to cast suspicion on the fairness thereof, good faith is presumed, and evidence of what one has actually paid for necessary repairs is admissible to show what the reasonable cost of such repairs is. *Atchison v. Steamboat*, 14 Mo. 63-69; *Hildreth v. Fitts*, 53 Vt. 684-690.

The judgment of the Superior Court is affirmed.

Judgment affirmed.

FRANK V. NEWELL AND CHARLES W. SPRAGUE
V.
CHRISTENA SASS.

Real Property—Streets and Alleys—Obstruction of Alley—Rights and Obligations of Parties Holding under Same Subdivision.

One of the legal consequences, where two or more parties hold land under the same subdivision, is that neither party can obstruct the other in the use of any alley in the subdivision if, to that other, such use, in connection with his lots, be highly convenient and beneficial.

[Opinion filed January 14, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Mr. H. S. MECARTNEY, for appellants.

Mr. JAMES MAHER, for appellee.

GARY, J. By this record it appears that the widow and

43	580
142	104
43	580
51	189

heirs of Richard J. Hamilton, one of the prominent early citizens of Chicago, being seized in fee of property fronting south on West Monroe street in Chicago, made a subdivision thereof in 1862, by which lots numbering 9 to 12 inclusive, counting westward, were laid out fronting on Monroe street, with an alley twenty feet wide bounding the north end of them, and on the west side of lot 12 an alley seven and one-half feet wide from the twenty-foot alley to the street. The appellee deraigns title from the Hamilton seizin to lots 9 and 10, and the bill alleges and the answer admits that the appellant owns lots 11 and 12, but his title is not deraigned by allegations or proofs. However, as the seizin in 1862 of the whole subdivision is shown, his title is presumptively from that source, and thus both parties claim from a common source, and both are bound by the legal consequences that result from holding under the same subdivision. One of those consequences is that neither of them may obstruct the other in the use of any alley of the subdivision, if to that other such use in connection with his or her lots be "highly convenient and beneficial." So many cases on the subject are collected by the court and counsel in the case quoted from that we will cite only that—*Cihak v. Klekr*, 117 Ill. 643.

The appellant commenced to build on lot 12, projecting a bay window over the alley on the west side of his lot. The appellee filed the bill in this case and obtained an interlocutory injunction which stopped that. Her bill prayed that on a final hearing the appellant might be compelled to remove all obstructions to the free use by the appellee of the alley. *Pendente lite* the appellant has taken complete possession of the south one hundred and fifty feet of that narrow alley and prevents passage through it. The final decree is only enjoining the appellant from "in any way obstructing" the alley; does not in terms require him to remove obstructions already placed there. The effect of that decree, and whether it is all that the appellee ought to have, are questions not before us; no cross-errors are assigned.

As a fact in the case, the court below has found, in effect, that the use of this alley is highly convenient and beneficial

to the appellee as owner of lots 9 and 10, and the evidence warrants the finding. That convenience and benefit to the appellee of this exercise of her legal right entitle her to a decree protecting it.

Decree affirmed.

AUGUSTUS L. SARGENT

V.

WILLIAM S. MCGUIRE.

Real Property—Contract for—Sale of—Execution of by Agent—Verbal Authority—Recording of Contract—Bill to Remove Cloud.

In the case presented, a contract for the sale of real estate was executed by an agent, acting under parol authority; the vendor subsequently refused to complete the transaction, whereupon the contract was recorded; this court holds that, under the circumstances of the case, a bill to remove the cloud from the vendor's title was properly sustained.

[Opinion filed January 14, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

Messrs. H. S. MECARTNEY and H. A. CRAVENER, for appellant.

Messrs. KING & GROSS, for appellee.

WATERMAN, P. J. One Warren F. Pitney, a real estate agent, obtained permission from appellee to sell certain real estate belonging to appellee for \$55 per foot net. Thereupon Pitney made, in the name of appellee, a written contract with appellant for the sale of such real property to him, appellant, and received from appellant \$100. Pitney afterward showed the contract to appellee, and handed to him \$50; he also gave to him a copy of the contract. The contract was signed by

Sargent v. McGuire.

Pitney as agent. Appellee refused to sign any receipt for the money, or to sign or authorize any one to sign a contract; he also refused to agree to pay any commissions, and Pitney said that appellant would pay the commissions if he, appellee, would take \$55 a foot. An abstract of title was furnished by appellee. The time limited in the written paper, signed by Pitney, for closing the matter up, was fifteen days. Seventeen days after the paper was given, appellant tendered to appellee \$1,006 and a note and mortgage for deferred payments, at the same time demanding a deed. Appellee refused to go on with the transaction. Appellant then placed the paper signed by Pitney on record; whereupon appellee filed a bill to remove the cloud thus cast upon his title. Before filing his bill, appellee offered to return the \$50 he had received and upon the hearing renewed this offer, including therewith an offer to pay the court costs up to that time. Appellant declined these offers. The court, by its decree, set aside and removed the cloud cast upon the title of appellee.

The contention of appellant is, that appellee having, as it is insisted, violated his verbal promise, a court of equity should not afford him any relief; it is also insisted that it was error to grant the relief prayed, except upon condition that appellee refund to appellant the \$100 received by Pitney. We see no sufficient reason for interfering with the decree of the Superior Court. Pitney, who was really acting as the agent of appellant, to purchase this property, knew from the beginning that appellee would not bind himself in any way; he would merely make a verbal arrangement. He offered to return all the money he received, and we see no reason why he should pay to appellant money which Pitney received and so far as appears, still has. The paper received by appellant, did not purport to be signed by appellee, and we do not think appellant could have been misled in this matter. The decree does not purport to discharge appellee from any obligation he may be under in respect to the money deposited by appellant; it merely removes a cloud created by appellant, and which ought never to have existed.

The decree of the Superior Court is affirmed.

Decree affirmed.

I. BACHARACH
v.
JAMES MCCURRACH ET AL.

Statute of Frauds—Promise to Pay Debts of Another.

The statute of frauds requires that the promise to pay the debts of another shall be in writing, and the common law requires such promise to be based upon a sufficient consideration, else the promise is not binding.

[Opinion filed January 14, 1892.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Messrs. SEARS & ARND, for appellant.

Messrs. KRAUS, MAYER & STEIN, for appellees.

GARY, J. One Marx was in business in Chicago, and indebted to the appellant and appellees, and to others.

Marx delivered his stock of goods to the appellant and left Chicago. The only evidence of the value of the stock is from the appellant, who says it was worth less than the amount Marx owed him. The appellant held also a note made by Marx of \$250, which had been given at the appellant's request, as Marx could not pay, and which the appellant procured to be discounted, but had to take up. Marx went to England, telling the appellant to send the note to him, and he would pay it, but never sent his address.

There is testimony that the appellant promised the appellees that he would pay them what Marx owed them, but none that there was any such promise by appellant to Marx, or any consideration for, or note in writing of, such promise to appellees. They sued him upon that promise and recovered.

It is pretty clear that there was some arrangement between the appellant and Marx, that when Marx paid the note, appel-

Spinney v. Barbe.

lant was to pay the debts Marx owed, but Marx never paid it, so that no money has been received by the appellant for the use of the appellees.

One claim by the appellees is that the appellant held this note in trust, and should have enforced the collection of it from Marx before he left, and they cite *Walden v. Karr*, 88 Ill. 49, and *Prather v. Vineyard*, 4 Gilm. 40. This case does not resemble in facts, or principle involved, either of those. Here there was no trust, no money received by the appellant to the use of the appellees, no consideration for any promise by him to pay them, and no note in writing of any such promise. The case illustrates the wisdom which prompted the statute of frauds.

The appellees have no case against the appellant. The statute of frauds requires that the promise to pay the debt of another shall be in writing, and the common law requires that promise to be upon a sufficient consideration; else the promise is not binding. *Eddy v. Roberts*, 17 Ill. 505, to that effect, has been cited by the Supreme Court, with approval, more than a dozen times.

The judgment is reversed and the cause remanded.

Reversed and remanded.

E. C. SPINNEY
V.
MORRIS BARBE.

43 585
57 210

Fixtures—When Mirror a Part of Realty—Error in Favor of Appellant—Practice.

1. Upon the case presented, this court holds that the mirror, for removing which damages were sought, was a part of the realty.
2. Appellant can not complain here of an error committed by the lower court in his own favor.

[Opinion filed January 14, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding.

Mr. D. M. KIRTON, for appellant.

Mr. W. A. FOSTER, for appellee.

MORAN, J. Appellee recovered a judgment against appellant for \$115, being the value, as found by the court, of a certain *console* mirror which was removed by appellant, from a certain house purchased by appellee from appellant. It is to be inferred from the evidence, and it is assumed by both parties, that the house was deeded to appellee and paid for before appellant removed the mirror. The evidence showed that the mirror was firmly attached to the chimney breast by a frame molding and seat which was of the same character and finish as the balance of the woodwork of the parlor, and in removing it a part of the plaster was knocked off of the chimney breast, and a new base board had to take the place of the seat of the mirror. The chimney breast was not complete or in keeping with the finish of the rest of the room, without the mirror. It, with the frame molding and seat, constituted a part of the finish of the room, as much so as the base and bead molding on other portions of the wall. Ordinarily a mirror, merely secured to the chimney wall so as to be safely held, would not become a part of the realty, but in determining the question whether such an article is part of the realty or not, reference must be had to the manner and extent of the annexation, as well as to the purpose of it, and if from these an intent to annex to the freehold is manifest, the attached article will be held to be part thereof. As between vendor and vendee, the intendment is strong as against the vendor. Lawson's Rights and Remedies, Sec. 2900; McLaughlin v. Johnson, 46 Ill. 163; Connor v. Squiders, 50 Vt. 163.

Having been built in as described, and so attached to the chimney front that it could not be removed without tearing away a portion of the plastering and removing the seat, which latter had to be replaced with a new base board, we regard

North Chicago Street Ry. Co. v. Thurston.

the intent to annex it to the freehold as sufficiently manifested and must conclude that it passed by the deed of the land.

The court was right in rendering judgment against appellant. The fact that the court held as a matter of law that the mirror was not part of the realty, but was personal property, and then found that it was sold to appellee as personal property, will not avail appellant. The judgment was right, though the judge erred in holding the proposition of law which appellant requested him to hold. The error was in appellant's favor and committed on his request, and he can not urge it here to reverse a judgment against him which the facts and the law both support.

Judgment affirmed.

NORTH CHICAGO STREET RAILWAY COMPANY

V.

WALTER P. THURSTON, BY NEXT FRIEND, ETC.

Street Railroads—Personal Injuries—Injured Party a Mere Licensee—Gross Negligence Alone Authorizes Recovery.

A newsboy was injured while clinging upon the front platform of a street car, as the result of the car running off the track; this court holds, in an action brought against the street car company to recover damages for the injuries so received, that as the evidence failed to show that the street car company or its employes were guilty of gross negligence, the boy, who was not a passenger but a mere licensee, could not recover.

[Opinion filed February 9, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

The plaintiff in this case, appellee, testified that he was a newsboy; that in May, 1877, in Chicago, at South Water street, he and his companion, a fellow newsboy, turned the corner of Fifth avenue and ran and jumped on a car; that he, plaintiff,

iff, ran along the side of the car, heard some one whistle and jumped on the front platform; that he was about to serve a passenger with a paper when his hand was caught between the railing of the car and the standard of the bridge; that he could not tell how long it was after he got onto the car before it struck the bridge, it was so sudden; that he was holding to the railing with his left hand and trying to get a paper from underneath his arm with the other hand. The car was ten or fifteen feet from the bridge when appellee jumped on. The car appears to have run off the track when near the bridge; the boy who drove the third horse, to assist up the incline, says that it flew the track at the place where the plank approach to the bridge begins; it moved about twenty to twenty-five feet after it got off.

There was evidence that there was at that time a rule of the company, enforced to some extent, directing conductors not to let newsboys get on the front end of cars; and there was evidence that newsboys were permitted to get on and off the cars and that they sometimes got on the front platform and were not ordered off.

The jury returned a verdict of \$3,000 for the plaintiff, upon which there was judgment, from which the defendant appealed.

Messrs. EDMUND FURTHMANN and WILLIAM B. KEEP, for appellant.

Mr. ALEX. CLARK, for appellee.

WATERMAN, P. J. The plaintiff not having been a passenger, being at the most but a licensee, the obligation of appellant toward him rested not upon a duty arising out of a contract, but upon grounds of general humanity and respect for the rights of others, and required that appellant should not wantonly or wilfully inflict an injury upon him. *Fleming v. Brooklyn C. R. R. Co.*, 1 Abb. N. S. 433; affirmed, 74 N. Y. 618; *Blackmoor, Adm'x, v. Toronto Street Ry.*, 38 Can. Q. B. Rep. 172; *I. C. R. R. Co. v. Godfrey*, 71 Ill. 500; *I. C. R.*

R. Co. v. Hetherington, 83 Ill. 510; Blanchard v. L. S. & M. S. Ry. Co., 126 Ill. 416; Lake Shore & M. C. R. R. v. Blanchard, 15 Ill. App. 582; Bloch v. Smith, 7 Hurlst. & Nor. 736; Parker v. Portland Pub. Co., 69 Me. 173; C. B. & Q. R. R. Co. v. Mehlsack, 131 Ill. 61.

It seems to us that the evidence in this case fails to show that appellant wantonly or wilfully inflicted any injury upon appellee or was guilty of gross negligence. It is not pretended that appellee was wilfully injured. Was there wantonness, a reckless disregard under the circumstances of appellee's right, a manifestation of indifference to his safety? It does not appear that any of appellant's servant were aware that appellee was upon the front platform of the car. The driver of the car was, as was his duty, giving his attention to his team. Quite a number of teams were following the car; it was six o'clock in the evening, perhaps the time when the street is most crowded, and the attention of the driver is necessarily most absorbed in his endeavor to get his load up the incline that leads to the bridge and to keep out of the way of teams behind and reasonably near to the team in front. It is not infrequently the case that street cars run off the track and their doing so is not ordinarily attended with danger to any one; they are usually pulled or lifted on again without much difficulty and without injury to anybody. We think the evidence fails to show that either the conductor or driver of this car acted recklessly or in wanton disregard of the safety of appellee or any one else. Appellee, who was not a passenger, was the only person injured; the step upon which he stood was not crowded; he took no care for his own safety; and while it is true that he is to be held bound to exercise only such care as is to be expected from a person of his years and experience, yet it can not be said that his years and experience were such that he might be entirely indifferent to his own security.

The evidence in this case, instead of showing either a wanton or wilful disregard by the servants of appellant of the safety of persons who might be upon the car, shows rather a misjudgment under circumstances where the most prudent man

might have failed to realize or do what, under the exigency of the moment, was best; the negligence of the driver and conductor, if any, was not gross, and the accident to appellee not one for which, under the evidence presented in this case, appellant can be held to respond in damages.

The judgment of the Superior Court will be reversed and the cause remanded.

Reversed and remanded.

EZEKIEL P. MURDOCK

V.

GEORGE WALKER, ADMINISTRATOR, ETC.

*Malpractice—Variance—Evidence—Negligence—Concurring Negligence
no Defense.*

1. Proof of more than is alleged in the declaration constitutes no variance.

2. Where a prescription is, by a *lapsus calami*, improperly written, as result of which the person taking it dies, the fact that the druggist who fills the prescription may have been negligent, is no defense to the physician writing it in an action against him for malpractice.

[Opinion filed February 9, 1892.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Messrs. FLOWER, SMITH & MUSGRAVE, for appellant.

Proof of the prescription of a mixture composed of four ingredients, one of which may be laudanum, does not support an allegation that defendant prescribed laudanum. Wright v. C. & N. W. R. R., 27 Ill. App. 200, and cases there cited; P. R. & A. R. Co. v. Tompkins, 10 S. E. Rep. 356; T. W. & W. Ry. Co. v. Morgan, 72 Ill. 155.

Where a patient or those in charge fail to follow the instructions of a physician, and injury results, the physician is

Murdock v. Walker.

not liable. Waite on Actions and Defenses, Vol. 6, p. 599, Sec. 4; Note to Howard v. Conover, 48 Am. Dec. 484; McCandless v. McGwa, 26 Pa. St. 95; Potter v. Warner, 36 Am. Reports, 668.

Where there is intervening negligence (as in this case on the part of the druggist) such as the defendant could not reasonably anticipate, and the injury would not have occurred but for such intervening negligence, the first person in fault is not liable. 1 Shearman & Redfield on Negligence, Sec. 34, and note 2, and cases cited; 2 Thompson on Negligence, 1089; Whittaker, Smith on Negligence, 31, and cases cited by above text writers.

The custom upon which the appellant relied was admissible on the question of the intervening negligence of the druggist. Pa. Co. v. Stoelke, 104 Ill. 201; Beard v. Ill. Cent. R. R., 79 Ia. 518.

Messrs. LUTHER LAFLIN MILLS and JOHN MCGAFFEY, for appellee.

GARY, J. The appellant is a physician. The appellee is administrator of his own infant son, who being ill, the appellant wrote a prescription which, by *lapsus calami*, had *pulv.* instead of *camph.* following *opii*. The result was that the baby took it and died.

The suit is for the damages sustained by the next of kin in consequence of that death. The declaration alleges a prescription of a "poisonous medicine, to wit, the tincture of opium, otherwise known as laudanum." The whole prescription consisted of four ingredients, and as only one of them could be translated "laudanum," the appellant objected below, and now insists that there was a variance. It is only, however, a case of proving more than alleged, which is no variance. 1 Greenleaf on Evidence, Sec. 67. The prescription was headed "For George Walker (baby)," and the appellant testified that he had directed the family to take his prescriptions to another drug store than the one where this was filled.

The preponderance of the evidence is that the proper form

of a prescription of laudanum is "*Tr. opii*," and the addition of "*pulv.*" is not used, though it adds nothing to the meaning, while the addition of "*camp.*" does change it. Then he offered to show a custom among druggists in Chicago, that on a prescription, showing that it was for a baby, such a prescription as this was, would not be filled without consultation with the physician. The argument is that the negligence of the druggist, which the appellant could not anticipate, was the proximate cause of the misfortune, which relieves him from liability. But the authorities cited—1 Shearman & Redfield on Neg., Sec. 34, 2 Thomp. on Neg., 1089, do not support that position. At most, the negligence of the druggist concurred with that of the appellant in producing the result, which is not a defense. 2 Thomp. on Neg., 1088. Even the exception there stated by Thompson is now rejected by all authority which governs us. *Chicago City Ry. Co. v. Wilcox*, 33 Ill. App. 450. No error was committed, therefore, in refusing to admit evidence of that custom. On the whole case the judgment must be affirmed.

Judgment affirmed.

JOSIAH L. FAIRBANKS ET AL.

V.

JOHN V. FARWELL ET AL.

HANNAH M. REMINGTON

V.

SAME.

Practice—Saving Expense to Parties.

In the case presented, an order of the Circuit Court is affirmed in order that the question involved may be speedily presented to the Supreme Court for final determination.

[Opinion filed February 9, 1892.]

APPEALS from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding.

Rigdon v. Conley.

Messrs. HUTCHINSON & LUFF, for appellants.

Messrs. GEORGE F. WESTOVER and ALEX. CLARK, for appellees.

WATERMAN, P. J. The above entitled causes are appeals taken from an order of the Circuit Court, denying motions by the appellants and Samnel D. Ward, made in the case of Samuel D. Ward v. John V. Farwell et al., that the said appellants, intervening petitioners, be substituted in the place of said Ward as complainants in the bill by him filed. We affirm the order of the Circuit Court with some reluctance, as we do not feel entirely confident that appellants were not entitled to be substituted as complainants as they desired; but we feel, as expressed by the Circuit Court, that it is better that these appeals go before the Supreme Court, in order that if the judgment of the Circuit Court is correct it may be affirmed at once, and that a great expense in the way of prosecuting this bill under such substitution may not be unnecessarily made, as it would be should the Supreme Court after such prosecution hold that such substitution was improperly allowed.

The order of the Circuit Court is therefore affirmed.

Order affirmed.

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CHARLES W. RIGDON

v.

JOHN W. CONLEY.

Effect of Decision on Former Appeal—Contract—Deposit of Cash—Credit on Books as Substitute for.

Appellee contracted with appellant to deposit in his favor a certain sum with a firm named; this court holds that the firm in question having charged appellee and credited appellant with the stated sum upon its books, that the contract had been complied with by appellee.

[Opinion filed February 9, 1892.]

APPEAL from the Superior Court of Cook County; the HON. ELLIOTT ANTHONY, Judge, presiding.

Mr. THOMAS J. SUTHERLAND, for appellant.

Mr. A. B. JENKS, for appellee.

GARY, J. This case was before us at the October term, 1888, and is reported in 31 Ill. App. 630.

The question now upon this record was incidentally involved then, but was not the point upon which the case was decided. The attention of the court was directed to the right of the appellant under Sec. 9, Chap. 51, R. S., as a matter of practice.

If, therefore, in the opinion rendered then, there appears to be inconsistency with the present decision, the circumstances take the case out of the general rule, that the opinion of a court of review on one appeal in the case, is the law of that case on a second appeal.

The appellee sued the appellant upon an admitted liability. The appellant pleaded a set-off of \$7,000, which he testified that the appellee agreed to pay for the appellant to the firm of John W. Rumsey & Co., of which the appellee was a member. What that firm was to do with the money, or whether he would in any way have any further interest in it, the appellant did not say; nor was there any testimony that he ever had any communication with the firm about it. The appellee produced a paper signed by the appellant, but not by the appellee, purporting to relate to the same transaction, in which, as to the \$7,000, the language is that the appellee was "to place to the credit of the 'appellant' or his assigns, on the books of the firm of John W. Rumsey & Co., of said city of Chicago, the said sum of seven thousand dollars (\$7,000) to be drawn by the 'appellant' in one year from the date hereof; the said sum during said time is accepted by said firm as cash margins on the purchase of grain and provisions on the Board of Trade, in said city of Chicago, on orders

from the said party of the first part, or his assigns." The appellant denied that that paper was the contract between the parties, and nobody as a witness, said that it was. That the appellant had been credited, and the appellee charged, with the sum on the books of the firm was undisputed; but offers by the appellant to show, in effect, that neither the firm, nor the appellee, had any such sum of money, in actual cash, were denied and exceptions taken. The majority of the court are of the opinion that the contract between the parties, taken either upon the testimony of the appellant, or the words of the paper, is complied with when the firm of John W. Rumsey & Co. were placed in such relation with the appellant that the firm must account to him for the money. There is no evidence of dissent by the other member of the firm, and without such evidence, he was bound by the books of the firm. *Kitner v. Whitlock*, 88 Ill. 513; *O'Brien v. Hanley*, 86 Ill. 278; *Corbin v. McChesney*, 26 Ill. 231. Mere bookkeeping, in most commercial transactions of magnitude, stands in the place of the actual handling of cash. *Russell v. Hadduck*, 3 Gilm. 233. Between principal and surety, if the surety by arrangement with the creditor, substitutes his individual credit for the obligation for which he is surety, it is payment between himself and his principal. *Wilkinson v. Stewart*, 30 Ill. 48, and cases there cited.

If this construction of the contract be correct, all other questions made by the appellant are immaterial, and require no consideration.

The judgment is affirmed.

Judgment affirmed.

VALERIA W. FISHER ET AL.

V.

HETTY H. R. GREEN ET AL.

Trust Deeds—Power of Sale—Death of Owner of Equity of Redemption—Construction of Statute.

The statute forbidding a sale of property to be made under power of sale contained in a mortgage or trust deed where the owner of the equity of redemption of the premises covered by the mortgage or deed had died before such sale, is not retroactive so as to nullify provisions of a deed which were legal at the time the deed was executed and delivered.

[Opinion filed February 9, 1892.]

APPEAL from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding.

Mr. CONSIDER H. WILLETT, for appellants.

Messrs. BISBEE & KERN, for appellees.

MORAN, J. In March, 1872, George W. Miller, who was the owner of certain real estate particularly described in appellants' bill filed in this case, executed a trust deed conveying said real estate to Benjamin E. Gallup, to secure the payment of said Miller's note to Hetty R. Green, for the sum of \$7,000, with interest thereon in five years from the date of said note. In March, 1873, one Charles C. Fisher purchased the north half of said described real estate from said Miller, subject to one-half said incumbrance, which said Fisher assumed and agreed to pay as part of the purchase money. In 1874 Fisher subdivided his portion of the property into ninety-six lots, and conveyed to one Snow twenty-four of them. The remaining seventy-two lots he conveyed to said Miller by quit-claim deed in 1876, and it is alleged in the bill filed herein that said conveyance was in fact a mortgage to secure indebtedness due from Fisher to Miller. Fisher died January, 11, 1878, leaving him surviving his widow, Valeria W., and the other appellants, his children and only heirs at law.

July 10, 1878, Mrs. Green had the trust deed securing the notes to her foreclosed by a sale of the property, by the trustee under the power of sale contained in the said trust deed, after due advertisement, and after notice had been given both to her and the trustee that Fisher was dead, and that at his death he was the owner of the equity of redemption in the

property and that appellants were his heirs. At the sale by the trustee the property was bought in for Mrs. Green for \$3,500.

The bill now filed by appellants seeks to disregard the foreclosure and sale made by the trustee under the power and to redeem said land from the lien of said trust deed. Appellants' right to so redeem is based upon the statute which forbids a sale of property to be made by virtue of any power of sale contained in a mortgage or trust deed where the owner of the equity of redemption of the premises covered by the mortgage or trust deed had died before such sale. The statute relating to sales under mortgages and trust deeds in force when the trust deed in question in this case was executed provided that, "in case of the death of the grantor in any mortgage or trust deed given for the security of money, no sale shall be made by virtue of any power of sale contained in such mortgage or trust deed, or given in relation thereto, but the same may be foreclosed in the same manner as mortgages not containing power of sale may now be foreclosed at law or in chancery."

In 1874 the statute under which appellants claim the right of redemption in this case was enacted, and was in force when the sale of this property was made, July 10, 1878. Said statute provides: "In case of the death of the grantor in any mortgage or trust deed in the nature of a mortgage, such grantor being at the time of his decease the owner of the equity of redemption of the premises so granted, or in case of the death of any person holding the equity of redemption of any premises mortgaged or conveyed in trust as a security for money, no sale shall be made by virtue of any power of sale contained in such mortgage or trust deed, or given in relation thereto; but the same may be foreclosed in the same manner," etc.

The question presented is whether the said statute of 1874 can affect rights which were vested and had taken effect before such statute became operative as law. Will such a statute be construed so as to have a retroactive or retrospective effect to nullify provisions in a mortgage which were

legal at the time the mortgage was executed and delivered, and which, like all other terms of the instrument, are to be regarded as considerations operating between the parties to the transaction? When this trust deed was executed it gave the right to the holder of the notes which it secured to foreclose the said trust deed under the power of sale contained therein, unless before said sale the grantor in the deed should have died. If there had been a default which authorized a foreclosure of the trust deed at any time before the passage of the act of 1874, the right of the then owner of the equity of redemption, whoever he might be, would have been foreclosed by such sale provided the grantor in the trust deed was living at the time of such sale.

The conditions under which the sale could be made at the time the trust deed was delivered, formed a part of the obligation of the contract between the mortgagor and the mortgagee. These conditions and obligations can not be altered or affected by a subsequent statute without impairing the obligation of the contract. A statute which in terms forbade the foreclosure of a mortgage under a power of sale which was valid when the mortgage was executed and delivered, or which created rights of redemption in persons who had no such rights as against the mortgagor under the law as it existed when the mortgage was made, would be void as violating the Constitution of the United States. This has been repeatedly decided by the U. S. Supreme Court. *Bronson v. Kinzie*, 1 How. 316; *Howard v. Bugbee*, 24 How. 461; *Edwards v. Kearzey*, 96 U. S. 607. The fact that the construction contended for would render the statute invalid is a strong reason for not giving it such meaning.

Without regard to that view, however, the rules regulating the construction of statutes forbid giving them retroactive operation unless the intention of the legislature that they shall so operate is manifested by clear and unequivocal expressions.

It was said by the Supreme Court of this State as early as 1828, in *Jones' administrators v. Bond*, Breese, 287, that it is "a general rule that all statutes shall operate prospectively only, and courts never give them a retrospective operation,

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unless the legislature use such language as to leave no doubt that such was their intention, and enlightened courts have ever disputed the power of the legislature to pass retrospective laws which take away vested rights." In *Garrett v. Wiggins*, 1 Scam. 335, it is said: "Without the clearly expressed intention of the legislature, courts will not give to a law a retrospective operation, even where they might do so without a violation of the paramount law of the constitution."

The rule thus early announced by the Supreme Court of this State has been frequently repeated and never departed from. *Robinson v. Rowan*, 2 Scam. 499; *Thompson v. Alexander*, 11 Ill. 54; *Matthias v. Cook*, 31 Ill. 83; *In re Fuller*, 79 Ill. 49; *Hatcher v. Railway Co.*, 62 Ill. 477; *Dobbins v. First Nat. Bank*, 112 Ill. 553; *Means v. Harrison*, 114 Ill. 248; *Drainage District v. Benson*, 125 Ill. 490.

The statute under consideration can therefore operate only on mortgages and trust deeds executed after it became a law. No language contained in the act will warrant such a construction as would allow it the effect contended for by appellants, nor would such a construction serve the purpose of justice. The sale under the power in the trust deed operated to cut off all right, title and equity of redemption which appellants, or either of them, had in the land covered by the mortgage at the date of said sale, and appellants are without standing to maintain this bill.

The decree of the Circuit Court will therefore be affirmed.

Decree affirmed.

RAILWAY PASSENGER AND FREIGHT CONDUCTORS'
MUTUAL AID AND BENEFIT ASSOCIATION
V.
ANN E. LOOMIS.

Insurance—Mutual Benefit Associations—Action on Certificate—Limitations—Forfeiture of Membership—Notice of Assessments—Board of Directors, Powers of.

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1. The fact that, in an action on a benefit certificate, parol proof of the death, intestate, of the member, and that the plaintiff was his widow, is necessary, does not take the case out of the category of actions upon written instruments the limitation of which is ten years.

2. A provision of the by-laws of such organization, that members neglecting or refusing to pay assessments for thirty days from date of same cease to be members, is self executing, but the constitution and by-laws being silent on the subject of notice, the law requires it.

3. Where the law requires notice and the method is not prescribed, it must be personal.

4. Under the constitution of the appellant the beneficiary of a certificate issued by it is not finally concluded by the action of the board of directors in refusing to allow his claim.

[Opinion filed February 9, 1892.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Messrs. MILLER, STARR & LEMAN, for appellant.

The plaintiff's cause of action is barred by the five years' statute of limitations. Revised Statutes, Chap. 83; Plumb v. Campbell, 129 Ill. 101; Kanz v. Great Council Improved Order of Red Men, 13 Mo. App. 341; Ill. C. R. R. Co. v. Miller, 32 Ill. App. 259; Am. Ins. Co. v. Arbuckle, 32 Ill. App. 369; Jerome v. Williams, 13 Mich. 526; Hulburt v. Atherton, 59 Iowa, 91; S. C. 12 N. W. Rep. 780; Marion v. Shipley, 77 Ind. 553; S. C. 25 Alb. L. J. 128; Kinsey v. Louisa Co., 37 Ia. 438; Baker v. Johnson Co., 33 Ia. 151; Lamb v. Withrow, 31 Ia. 164; Rankin v. Schaeffer, 4 Mo. App. 108.

Contracts needing oral testimony to make them out, are unwritten for all purposes. Bishop on Contracts (enlarged), Sec. 164; Briggs v. Central R. Co., 31 Vt. 211; St. Louis, etc., R. Co. v. Maddox, 18 Kans. 546; Kalamazoo Novelty Mfg. Wks. v. McAllister, 40 Mich. 84.

The same rule applies to contracts needing oral testimony to make them out, under the statute of frauds. Grafton v. Cummings, 99 U. S. 100; Dwight v. Pomeroy, 17 Mass. 303; Lang v. Henry, 54 N. H. 57; Dana v. Hancock, 30 Vt. 616; Wright v. Weeks, 25 N. Y. 153; Browne on Statute of Frauds, 4th Ed., Sec. 372.

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Plaintiff's decedent was not a member of the defendant association in good standing at the time of his death, therefore plaintiff can not recover. Hansen v. Knights of Honor, 23 Chi. L. N. 255; Karcher v. S. L. K. of H., 137 Mass. 368; Maderia v. Merchants' Soc., 16 Fed. Rep. 749; Lantz v. Vermont L. Ins. Co., 21 At. Rep. 80; Yoe v. B. C. Howard M. B. Ass'n, 63 Md. 83; McDonald v. Ross-Lewin, 29 Hun, 87; Blanchard v. Atlantic, etc., Co., 33 N. H. 9; Am. Soc. v. Kilburn, 7 Ky. L. Rep. 750; Rood v. R. P. Ass'n, 31 Fed. Rep. 62; Supreme Council v. Curd, 111 Ill. 284.

The attempted reinstatement by mailing money in behalf of deceased after he had received mortal injury, and which was not received by the defendant association until after he had died, was ineffectual to reinstate him. Brown v. Grand Council, 46 N. W. Rep. (Iowa) 1086; Lantz v. Vermont Life Ins. Co., 21 Atl. Rep. (Pa.) 80; Want v. Blunt, 12 East, 183; Ins. Co. v. Rosenberger, 84 Pa. St. 373; Ins. Co. v. Rought, 97 Pa. St. 415; Hummel's Appeal, 78 Pa. St. 320; Ins. Co. v. Buckley, 83 Pa. St. 293; Ins. Co. v. Cochran, 88 Pa. St. 230.

Plaintiff's decedent was ineligible to reinstatement at the time the attempt at reinstatement was made.

The decision of the board of directors rejecting plaintiff's claim was final. Rood v. Ry. Pass. and Ft. Conductors' M. A. and B. Ass'n, 31 Fed. Rep. 62; Black & Whitesmiths v. Vandyke, 2 Whart. 309; Toran v. Howard Ass'n, 4 Pa. St. 519; Commonwealth v. Pike Ben. So., 8 Watts & S. 247; Hummel's Appeal, 78 Pa. St. 320; Karcher v. Supreme Lodge, 137 Mass. 368; Anacosta Tribe v. Murbach, 13 Md. 94; Osceola Tribe v. Schmidt, 57 Md. 98; Griggs v. Mass. Med. So., 111 Mass. 185; Robinson v. Yates City Lodge, 86 Ill. 596; Fisher v. Board of Trade, 80 Ill. 85; People v. Board of Trade, 80 Ill. 134; Baxter v. Board of Trade, 83 Ill. 146; Sturges v. Board of Trade, 86 Ill. 441; State ex rel. Paulson v. Odd Fellows, 8 Mo. App. 188; Ill. Masonic Ass'n v. Baldwin, 86 Ill. 479; Chase v. Cheney, 58 Ill. 509.

The court having so ruled and overruled the demurrer to the plea, setting up the decision of the directors, and the plaintiff having replied over, settled this question in this case.

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Williams v. Baker, 67 Ill. 238; Ill. C. R. R. Co. v. Patterson, 69 Ill. 650.

The approval of the claim by the board of directors is, by the by-laws, a condition precedent to the existence of any liability by the defendant. Defendant's undertaking is to pay over the proceeds of such assessments as the board of directors may order, in payment of such claims as the board may approve. Plaintiff does not show performance of these conditions precedent, therefore she should not recover. Smith v. Cov't Mut. Ben. Ass'n, 24 Fed. Rep. 685; Rood v. R. P. Ass'n, 31 Fed. Rep. 62; Reed v. Washington Ins. Co., 138 Mass. 575; Wood v. Humphrey, 114 Mass. 185.

Messrs. SIDNEY C. EASTMAN and GEORGE E. SWARTZ, for appellee.

The action is upon a written contract and is not barred by the statute of limitations. Ill. Rev. Stat., Chap. 83, Sec. 16; Ill. Cent. R. R. Co. v. Johnson, 34 Ill. 389; Jassoy & Co. v. Horn, 64 Ill. 379; Schalucky v. Field, 124 Ill. 617; First Nat. Bank v. Coleman, 11 Ill. App. 508; Fleischer v. Rentchler, 17 Ill. App. 402; Ames v. Moir et al., 27 Ill. App. 88; Ames v. Moir et al., 130 Ill. 582; Cochrane v. Oliver, 7 Ill. App. 176; Memory v. Niepert, 131 Ill. 623; Wing v. Evans, 73 Iowa, 409; Ashley v. Vischer, 24 Cal. 322-328.

A written contract may be contained in several separate papers. Bishop on Contracts, Sec. 165 (Enlarged Ed.); Bradley v. Marshall, 54 Ill. 173.

The action accrued within five years from the time the suit was brought. Bacon on Ben. Soc., etc., Sec. 445; Derrick v. Lamar Ins. Co., 74 Ill. 404; Home Ins. Co. v. Myer, 93 Ill. 271.

The decedent, Loomis, was a member in good standing at the time of his death.

Where the insured has thirty days in which to pay an assessment and dies within that time without paying it, he is not in default on that account. Protection Life Ins. Co. v. Palmer, Adm'r, 81 Ill. 88, bottom of page 95; Niblack on Mut. Benefit Soc., Sec. 237, page 315; Grand L. S. S. O. of Mut. Aid v. Besterfield, 37 Ill. App. 522.

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The secretary's report was properly admitted in evidence. Niblack on Mut. Benefit Soc., Sec. 399.

Waiver: That the association did not consider Loomis as having forfeited his rights, is shown by the levying of assessments against him subsequent to the time in which they now claim he was in default, and such action waives the default if any existed. Niblack on Mutnal Benefit Soc., Secs. 339, 335 and 345; Bacon on Benefit Soc. etc., Sec. 431; Chicago Life Ins. Co. v. Warner, 80 Ill. 410; Mut. Life Ins. Co. v. Amerman, 119 Ill. 329-335; The Am. Mut. Aid Soc. v. Quire, 8 Ky. Law Reporter, 101; Stylow v. Wisconsin Odd Fellows' Mut. Life Ins. Co., 34 North'West. Rep'r 151; Nat. Mut. Ben. Ass'n v. Jones, 84 Ky. 110; Viall v. The Genesee Mut. Ins. Co., 19 Barb. 440.

The certificate issued to a member is evidence of his good standing, and in the absence of proof to the contrary this condition will be presumed to continue. Niblack on Mut. Ben. Soc., Sec. 174; Bacon on Mut. Ben. Soc., etc., Sec. 414; Sup. Lodge K. of H. v. Johnson, 78 Ind. 110.

The burden of establishing the failure to pay assessments is upon the defendant. Bacon on Mut. Ben. Soc., Sec. 469, top of page 706.

The defendant, seeking to show a default in the payment of assessments, must prove that such assessments were duly and regularly levied by the proper authority, and for proper purposes. This the defendant has failed to do. Niblack on Mut. Ben. Soc., Secs. 277, 278, 279 and 280.

The action of the board of directors in rejecting plaintiff's claim does not deprive the court of jurisdiction, nor the plaintiff of her day in court. Bacon on Ben. Soc., Secs. 71, 87, 94, 123 and 450 (and authorities there cited); Greenhood on Public Policy, rule 379, page 466; The Ry. Pass. and Frt. Cond., etc., Ass'n v. Robinson, Exr., (Supreme Court Ill., Mar. 30, 1891,) Chicago Legal News, Vol. 23, page 602.

Benevolent societies doing a life insurance business are in respect to such business subject to the same rules and principles of law as ordinary life insurance companies. Rockhold v. Canton M. Ben. Soc., 129 Ill. 440; May on Insurance, Vol.

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II, Sec. 550a; Bacon on Benefit Soc., Secs. 51 and 52; Goodman v. Jedidiah Lodge, 67 Md. 117.

Failure of the directors to order an assessment does not preclude appellee. Ry. Pass. & Frt. Cond., etc., Ass'n v. Robinson, Exr., Chicago Legal News, Vol. 23, page 602; Niblack on Mut. Benefit Soc., Secs. 392, 397 and 401; Hankinson v. Page, 31 Fed. Rep. 184-188.

GARY, J. This case illustrates the necessity of more skill and greater care in framing the rules by which the affairs of mutual benefit societies are to be governed. When a beneficiary sues upon a certificate, he or she is entitled to the application of principles of law, unless such application is prevented by the rules, which are adverse to the beneficial results contemplated in the formation of such societies, and even to their continued existence.

The appellee is the widow of H. H. Loomis. He made an application for membership in the appellant association as follows:

“DIVISION OHIO CENTRAL R. R.

November 11, 1880.

To Board of Directors, Railway Passenger and Freight Conductors' Mutual Aid and Benefit Association of the United States and Canada, Chicago, Ill.:

Gentlemen: The undersigned entertaining a favorable opinion of your association, is desirous of becoming a member of the same, and, if admitted, agrees to comply with the constitution and by-laws, rules and regulations thereof. I am not at present laboring under any disability which disqualifies me from following the avocation of a passenger or freight train conductor, and according to the best of my knowledge and belief, I am eligible to membership under the constitution and by-laws of your association.

My age is fifty-three, my residence, Basil, Ohio.

Respectfully,

H. H. LOOMIS.

Recommended by

F. H. PEASE,

W. W. STRAIGHT.

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We, the undersigned, members in good standing of the Railway Passenger and Freight Conductors' Mutual Aid and Benefit Association, certify that H. H. Loomis, whose name is signed to the written application for membership, is a person of good moral character and free from physical disability, and that he is ——— at present ———, has for a period of twelve months been employed as conductor of a passenger or freight train in the United States or Canada.

Given under our hands this eleventh day of November, 1880.

2268

F. H. PEASE,

1047

W. W. STRAIGHT.

November 16, 1880."

And a certificate was issued to him as follows:

"No. 2268. Railway Passenger and Freight Conductors' Mutual Aid and Benefit Association for the United States and Canada, organized under the laws of the State of Illinois, charter granted December, 1874.

CHICAGO, Nov. 16, 1880.

This is to certify that H. H. Loomis, residence, Basil, Ohio, is a member of the Railway Passenger and Freight Conductors' Mutual Aid and Benefit Association.

Given under our hands and the seal of the association affixed.

J. G. SHERMAN, President.

C. HUNTINGTON, Sec'y & Treas."

On the morning of the 10th day of July, 1883, he fell from a second story window of a hotel in Macon, Georgia, and from the injury received, died on the evening of that day.

That, if he was then a member in good standing, the appellant ought to have made an assessment upon surviving members, which would have produced \$2,500, that the appellant ought to have paid to appellee, is not questioned. It is therefore unnecessary to set out the documentary evidence showing the constitution and by-laws of the association by which that duty is imposed. If he was in good standing, his death intestate, and that she is his widow, were the only things to be proved by parol, in order to show that the contingency upon which the duty arose had happened, and that she was the person to whom that duty was owing. This parol proof did not take

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the case out of the category of actions upon written contracts, the limitation of which is ten and not five years. *Memory v. Niepert*, 131 Ill. 623; 2 *Taylor on Ev.* 1015; *Larned v. Johns*, 9 *Allen*, 419.

This disposes of the first point argued by appellant. The next three points are in effect but one, viz.: That Loomis was not a member in good standing at the time he died. If the fact be so, the point is good, but the burden of proving it is upon the appellant. The certificate is *prima facie* evidence to the contrary. One of the by-laws contains these words: "Members of this association neglecting or refusing to pay assessment for the period of thirty days from date of such assessment shall cease to be a member," etc. That this provision is self-executing, we think is true. *Hansen v. Supreme Lodge*, 40 Ill. App. 216.

But the proper construction of it is, that the thirty days begin to run only from the date that notice is given to the member, of the assessment.

The constitution and by-laws being silent on the subject of notice, and containing nothing dispensing with notice, the general rule of law governs, that notice is necessary where the act of one party gives rise to the duty of the other. The assessment, if made, was the act of the association. Before it can complain of neglect or refusal by a member to pay, he must be given notice. *Chase v. S. & C. R. R. Co.*, 38 Ill. 215. And wherever the law requires notice, and does not describe the manner, it must be personal. *Wachtel v. Noah*, 34 N. Y. 28.

There is testimony tending to show that notice was mailed to Loomis in time to put him in default if he had received the notice, but nothing showing to any reasonable degree of certainty that he received it. A witness states that the notice was in an envelope with a receipt sent for a prior assessment; the appellee states that she received that receipt and no notice came with it. The appellant was unable to prove sufficiently, notice to Loomis, and is therefore without defense upon that point. He was, for aught this record shows, a member in good standing when he died. The last point relied upon is based upon a clause of the constitution relating to the board of directors, as follows:

Railway Conductors' Mutual Aid Ass'n v. Loomis.

"They shall decide all points of dispute and questions of doubt that may arise, and their decision shall be final."

Preceding that is a clause, "to them shall all claims against the association be referred, and upon the approval of a majority of said board, with that of the president, the same shall be paid by the secretary and treasurer." If these two clauses are to be read together, the power of the board extends to the rejection but not to the allowance of claims. They may forbid, but can not direct, the opening of its treasury. We can not concur in the judgment of the United States Circuit Court of this district (*Rood v. this appellant*, 31 Fed. Rep. 62), that a beneficiary under a certificate issued by the association is dependent upon the will of the board, however honestly they may act, whether he or she shall be paid. It may well be that among the members themselves the decision of the board they elected, upon questions affecting them, is final; but if a stranger had let rooms, sold furniture or supplied stationery to them, it would not be contended that they could defeat his claim for compensation. The death of Loomis severed his relations with the association. The appellee had no voice in it. Her interests were adverse to the interests of all the surviving members, though they might perhaps feel that the denial of her claim might be a bad precedent for their own beneficiaries. That an organization may be such that the obligations shall be purely moral, without redress by law, may be; but the language by which that result is effected must be more explicit than that which is quoted.

Whether the declaration is in the right form is a question not made below, where, if necessary, it might have been amended, and therefore it can not be made here. *Citizens Gaslight Co. v. Granger*, 118 Ill. 266.

It is unnecessary to review the pleadings, traveling off to sur-rejoinders, the twenty-one reasons assigned for a new trial and the twenty-nine errors assigned. We have in substance followed the argument in the brief of appellant.

The judgment of the Circuit Court in favor of the appellee is affirmed.

Judgment affirmed.

SIMON SINSHEIMER

V.

WILLIAM SKINNER MANUFACTURING COMPANY.

Costs—Taxation of—Negligence.

Upon the question whether the non-attendance of a witness was caused by the neglect of the appellant, this court holds that the evidence sustained the decision of the court below, that such negligence was the cause of the non-attendance.

[Opinion filed February 9, 1892.]

APPEAL from the Circuit Court of Cook County; the Hon. GEORGE DRIGGS, Judge, presiding.

Mr. P. T. KEILY, for appellant.

Mr. JAMES A. PETERSON, for appellee.

WATERMAN, P. J. The opinion of this court upon the application out of which this proceeding has arisen, is reported in 37 Ill. App. page 467.

This is an appeal from an order of court taxing costs under the provisions of Sec. 29 of Chap. 51, entitled "Evidence and Depositions." The question presented was whether the non-attendance of the witness was from some cause not occasioned by the fault of appellant, or from some other unavoidable cause. We have examined the evidence upon this matter presented by the record in this cause, and we see no sufficient reason for interfering with the conclusion of the court below. It may be that appellant acted on the best information he had, but he either did not go far enough, or he did not take sufficient pains to get correct and full information. He gave notice to take the deposition of his intended witness without ever having had any communication with such witness to learn if he could or would be present at the time and place appointed;

Parmelee v. Raymond.

nor did appellant at any time get notice to such intended witness to attend according to the notice given to appellee.

The witness, it appears, actually was in Denver, the city wherein the deposition was to be taken, on the day appointed, and might by the use of proper exertion have been notified. He was a brother of appellant, and no reason for his non-attendance is shown, save the fault of appellant.

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

FRANK PARMELEE
V.
DORA RAYMOND.

43	609
67	586
43	609
92	1509
92	1513

Carriers—Action Against for Lost Baggage—Evidence—Value of Articles Lost—Misnomer.

1. Every one is presumed to know the value of articles in common use and it is not necessary to call a dealer to prove the value of such things.

2. In case of loss of articles of personal wearing apparel, the owner is entitled to recover the value of such things to him, not what the same would have sold for in the market.

3. That a party is known by one name as well as by another is a good replication to a plea of misnomer.

[Opinion filed February 9, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. JOHN P. ALTGELD, Judge, presiding.

Mr. EDMUND FURTHMANN, for appellant.

Mr. JOSEPH P. RAFFERTY, for appellee.

WATERMAN, P. J. This was an action against a carrier to recover for lost baggage; there was no dispute as to the loss of a sachel and contents; the question was as to the nature

and value of the articles contained in the sachel. Some evidence was admitted which ought not to have been, but the plaintiff was clearly entitled to a verdict for some amount and we think that the evidence, properly admitted, fairly warranted the verdict for \$150 rendered.

The plaintiff enumerated, so far as she could remember, the articles lost and gave a description of them; in substance she stated that their value was \$185.25; she also gave the separate value of some of the things which her sachel contained. It is objected that appellee was not shown to be competent to testify as to the value of the articles lost. They were mostly toilet articles and wearing apparel in common use. Every one is presumed to know the value of articles in common use, and it is not necessary to call a dealer to testify as to the worth of such things. *Ohio & Mississippi R. R. Co. v. Irvin*, 27 Ill. 178; *Lundberg v. Mackenhouser*, 4 Ill. App. 603. In the case of loss of personal wearing apparel the owner is entitled to recover its value to him, not what, as second hand or odd pieces, it would have sold for in the market. Any other rule would be most unjust. *Fairfax v. N. Y. Central R. R.*, 73 N. Y. 167; *Green v. Boston R. R.*, 128 Mass. 221.

It is insisted that the action should have been dismissed because it appeared that the plaintiff's name was not Dora Raymond. What appeared was that the plaintiff, a professional and public singer, constantly traveling, is known and professionally goes by the name of Dora Raymond and that she has a husband; it did not appear what her husband's name was. That a party is known by one name as well as another is a good replication to a plea of misnomer. *Schoonhoven v. Gott*, 20 Ill. 46; *Lucas v. Farrington*, 21 Ill. 31. A misnomer is at most but ground for an abatement.

The judgment of the Superior Court is affirmed.

Judgment affirmed.

Waska v. Klaisner.

JOHN WASKA
V.
ANNA KLAISNER.

Practice—Master's Report—Exceptions—Must be Definite.

The report of a master is conclusive until it is shown to be wrong, and in order to raise the question whether it is right or wrong, the party dissatisfied with it must, by objections before the master, repeated as exceptions before the court, point out with reasonable definiteness the error or mistake alleged.

[Opinion filed February 9, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

Messrs. CROSS & JINDRICH, for appellant.

Messrs. KRAUS, MAYER & STEIN, for appellee.

GARY, J. The appellant filed a petition for a mechanic's lien on the property of the appellee, for a balance he claimed to be due to him for building a house for her under a contract in writing. After issue joined the cause was referred to a master, who reported that nothing was due to the appellant. To ascertain whether that finding is correct, requires the examination of a very large mass of contradictory testimony.

The report of the master is conclusive until it is shown to be wrong, and in order to raise the question whether it is right or wrong, the party dissatisfied with it, must, by objections before the master, repeated as exceptions before the court, point out with reasonable definiteness the error or mistake alleged. Here the first objection and exception is "the findings, and each of them, are not warranted by the evidence," and the others are merely variations in words from that, in effect. This is insufficient. *Snell v. DeLand*, 27 N. E. Rep. 707; 36

43	611
46	564
48	611
47	609
43	611
54	319
54	591

Ill. App. 638; Farwell v. Huling, 132 Ill. 112; Huling v. Farwell, 33 Ill. App. 238.

If that report stood, the dismissal of the bill necessarily followed. All errors assigned go back in their operation to the report, and as that can not be questioned, there is no error, and the decree dismissing the bill is affirmed.

Decree affirmed.

ILLINOIS CENTRAL RAILROAD COMPANY

V.

EMLÉN S. BLYE.

Witnesses--Estimate of Time by--Excessive Verdict--Remittitur.

1. A witness should not be permitted to frame an answer to a question in such a way as to cover the very question to be found by the jury, where such finding is a conclusion based upon facts.

2. An excessive verdict may be cured by a *remittitur*.

[Opinion filed February 9, 1892.]

APPEAL from the Circuit Court of Cook County; the Hon. GEORGE DRIGGS, Judge, presiding.

Messrs. E. R. WOODLE and C. V. GWIN, for appellant.

Messrs. JOHN M. SOUTHWORTH and JOSEPH B. MANN, for appellee.

MORAN, J. This action was brought to recover for an injury sustained by appellee, when alighting from one of appellant's suburban trains at 27th street station in the city of Chicago. It was alleged that the accident to appellee was caused by the failure of appellant's servants in charge of trains to stop the train at the station a sufficient time to enable appellee to safely depart therefrom, and that while in the act

Illinois Central R. R. Co. v. Blye.

of stepping down from the car the train was started with a jerk and she was thrown to the ground and sustained the injury complained of.

There was a conflict of evidence as to the length of time that the train stopped at the station. Plaintiff's witnesses stated the time variously from two to five seconds, and defendant's witnesses at from seventeen to thirty seconds. Plaintiff testified, that when the train reached the station she was standing up in the door of the car with her hand upon the door to steady her; that when the train came to a stop she immediately followed some other passengers who were preceding her, down the steps of the car, and by the time she reached the last step the train started. Appellant introduced a witness who testified that he was in the same car with appellee on the occasion of the accident; that appellee did not go out of the car when the train came to the station but stopped and held a conversation with some one in the car for four or five seconds while the train was standing, and that when the train started she was on the platform, and that she stepped off hastily after the train was in motion.

The witness was asked this question:

"How long did the train stop? What opportunity did this lady have for leaving the train?"

A. I have no recollection of the time. She had sufficient opportunity if she had proceeded right out of the car."

This answer was on motion excluded by the court, as being an opinion of the witness and not a statement of fact, and this ruling of the court is assigned as error and seems to be chiefly relied on for a reversal. One of the very issues which the jury were to determine in this case was whether, if plaintiff had proceeded out of the car with ordinary diligence, she had a sufficient opportunity to do so. They were to determine that issue from evidence which should inform them how long the train stopped and what she did toward alighting. The answer excluded stated an inference or conclusion. It formulated the jury's verdict on the particular issue, instead of stating a fact or facts on which they might base a verdict themselves. Counsel argue that a witness is not confined in

estimating time, distance, quantity, etc., to a certain conventional standard, as of minutes or seconds, rods or miles, etc., but may choose his own form of expression and standard of comparison. That is very true, and the instance referred to by counsel of Horatio's measure of the time of the ghost's stay, is a happy illustration, of what would be a wholly unobjectionable answer—"While one with moderate haste might tell a hundred."

There is a very marked distinction between stating the time of such a comparison, and determining as the witness did, that the opportunity given appellee to leave the train was sufficient. One witness testifies she had sufficient opportunity to alight if she had proceeded right out of the car. Another says she had not. What basis has such evidence given the jury? No measure of time is given by either statement. A witness, though an expert, is never permitted to express an opinion in such a way as to cover the very question to be found by the jury. *C. & A. R. R. Co. v. S. & N. W. R. R. Co.*, 67 Ill. 142; *Nat. Gas Lt. & F. Co. v. Miethke*, 35 Ill. App. 629. The answer, though perhaps harmless, was technically improper, and there was therefore no error in its exclusion.

Complaint is made that the verdict was excessive. The court below required a *remittitur* of \$3,500 from the verdict and entered a judgment for \$9,000. It is the established practice in this State to allow excessive verdicts to be cured by remitting. The judgment rendered is large, but in view of the evidence tending to show that appellee is permanently injured, and in such a way as to diminish her earning capacity and to impair her ability to engage in pursuits for which she had fitted herself, we are unable to say that the amount fixed by the trial judge so exceeds a proper allowance of damages as to require that the judgment should be reversed.

We have considered the criticisms of appellant's counsel as to the instruction and we find no error committed in that respect.

The judgment will therefore be affirmed.

Judgment affirmed.

EVERETT HOUSE, IMPLEADED, ETC.,

V.

AMALIA BEAK ET AL., FOR USE, ETC.

43 615
141 290

Account Stated—Evidence Sufficient to Establish—Receipts for Goods, Effect of.

1. Undisputed evidence that an account had been presented to and left for a time with a defendant five years before trial, that thereafter such defendant had been repeatedly importuned for payment, that no objection had been made to any item in the account, and that defendant had, long before suit, gone out of business, held, in the case presented, to have been sufficient to sustain a claim of an account stated.

2. Receipts for goods given in the regular course of business, no complaint having been made, for years, that they were incorrect or improperly given, are *prima facie* evidence of the truth of their contents, although it does not appear that the persons signing them had any knowledge of the contents of the packages receipted for, other than appeared from their markings.

[Opinion filed February 9, 1892.]

APPEAL from the Circuit Court of Cook County; the Hon. GEORGE DRIGGS, Judge, presiding.

This was an action of assumpsit. The declaration contained, among others, a count for an account stated. It was shown that the parties for whose use the action was brought, sent to the defendants the following letter:

BEAK & BUCHER, 112 Clark Street, room 504.
CHICAGO, Dec. 26, 1885.

SEA & Co., 122 State Street.

Dear Sir:—I hand you herewith, account with Beak & Bucher against you, duly assigned to me. When due, you will please remit to me at above address, care of my attorneys, Messrs. Weigley, Bulkley & Gray.

The assignment on the face of the account will be my authority for drawing on you when the amount becomes due.

Respectfully yours,

WIGHT BROS.

Mr. Gray, a witness for plaintiffs, testified :

" I went to see Mr. Sea the Monday morning after Christmas, about half-past eight or a quarter of nine, and told him that this account of Beak & Bucher's had been assigned to Wight Bros., and that the payment of the same should be made at our office. As I recollect it now, he took the account and said 'all right.' That was all there was of it. I left this statement with Mr. Sea personally, at the time, but afterward got it back to our office in some way. We dunned him for payment, wrote him, interviewed him, but he did not pay. I do not know Everett House, the defendant, the only defendant who is defending this case. I am one of the firm of Weigley, Bulkley & Gray, counsel for plaintiffs. I should say that I left those papers with Mr. Sea; that is the best of my recollection. I can swear positively that I made them out for Sea."

The account so presented showed a balance due Dec. 26, 1885, from Sea & Co., of \$3,746.53 for goods consigned, and of \$384.48 for goods sold; it was shown that Sea & Co., the defendants, were in the habit of buying large amounts of goods from the plaintiffs, and that large quantities of goods were delivered by plaintiffs to defendants.

Receipts given by defendants for goods to the amount of \$3,640.30 were introduced, but it was not shown that the parties who signed the receipts for defendants inspected the packages, or had any knowledge as to the value of the contents other than the figures on the outside thereof. The books of the plaintiffs were introduced and these showed a sale of goods to the amount of \$2,287.82, and credits to the amount of \$1,904.44, leaving a balance of \$385.38 for goods sold; the books showed items of goods consigned to the amount of \$6,832.03 and credits of \$3,097.50, leaving a balance for goods consigned of \$3,734.53. As to consigned goods the arrangement was that Sea & Co. were to pay for goods when they sold them, and what was not sold they would return. Before the commencement of this suit the firm of Sea & Co. had dissolved and become insolvent. The last charge for goods was made December 22, 1885; the account was presented shortly afterward and this suit was begun in April, 1889. The jury

found a verdict for \$4,089.91 for the plaintiffs; upon this there was judgment.

Messrs. FLOWER, SMITH & MUSGRAVE, for appellant.

Messrs. WEIGLEY, BULKLEY & GRAY, for appellees.

WATERMAN, P. J. Upon the undisputed evidence that this account five years before trial had been presented to and left for a time with one of the defendants, that thereafter such defendant had been repeatedly importuned for payment, that no objection had ever been made to a single item and that the defendants had long before suit was brought, gone out of business, we think that the jury could not have done otherwise than return the verdict for the plaintiffs they did; such evidence was ample to sustain the claim for an account stated. This view of the case renders unnecessary a discussion of whether the books of account were or were not properly admitted.

It may properly be added that, in addition to the evidence of an account stated, receipts of the defendants acknowledging the reception of goods to the amount of \$3,640.30 were shown; in addition to these there were other receipts having no value marked thereon. While it is true that it did not appear that the person signing these receipts had any knowledge of the contents or value of the packages for which they gave receipt, other than that derived from marks on the outside of such packages, yet we think where packages are so received and receipts given in the regular course of business, and no complaint or objection is made by the party so receiving, that after the lapse of years, the burden is thrown upon the party whose receipts were thus made, to show that they were either made under a misapprehension or improperly given.

So as to the goods consigned; these, it appears, were not consigned to be sold on account; they were simply billed at a fixed price; all that the defendants obtained above this was theirs; if they did not sell they could return. There is no pretense that they made any return; five years have

elapsed since the account was presented to them; no objection was ever made to it. After all this time the burden is thrown upon defendants of showing what has become of these goods. All the surroundings of the transaction go to show that the claim of the plaintiffs is a just one. .

The judgment of the Circuit Court is affirmed.

Judgment affirmed.

CHARLES SHACKELFORD

V.

MARY G. CLARKE.

Banks—Loan—Substitution of Checks of Son of Lender for Original Check—Instructions.

In the case presented, this court holds, the bank upon which certain checks were drawn having remained solvent, that an instruction to the jury that it was the duty of the receiver of the checks to present the same for payment not later than the day after that on which they were received, was erroneous.

[Opinion filed February 9, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Appellant desiring to borrow money, made an arrangement with appellee to loan him the sum of \$1,500, to be secured by his note and mortgage. Appellant prepared his note and mortgage, and had an abstract of title to the property brought down to date ready for inspection by appellee or her agent. Appellee, according to her testimony, made her check for \$1,500, payable to the order of her son, Frank Clarke. He deposited the money in the bank to his own credit, made his own three checks for \$500 each, to the order of appellant, and took them to the office of appellant, where, according to the testimony of appellant, he and Frank Clarke looked over the papers, compared appellant's note with

the trust deed made by him, looked through the abstract of title, and when Frank Clarke expressed himself as satisfied with the title, he put appellant's note and trust deed in his pocket with the abstract of title; then Frank Clarke took out of his pocket his three checks, and said: "Now here are my three checks for \$500 each, and one of these three checks will be cashed—honored on presentation. I have no money in bank to pay the other two, and mother has loaned me the other \$1,000. You won't have to pay any interest on that \$1,000 until you get the money." Appellant said, "Does she understand all about this?" Clarke replied, "Perfectly; it is all satisfactory to her. I am in a great hurry, but if you will give me notice, mother is continually having money coming in on her loans, and she will place it to your credit in bank whenever you notify me. I am attending to her business."

The testimony of Frank Clarke in respect to this in substance is, that he told appellant that the money was in bank to pay all the checks, but that he, Frank, wished that appellant would loan him \$1,000 of the money for a short time, and that if he (appellant) would not present two of the checks at present, he (Frank) would pay him eight per cent interest on the same up to the time that he did present them, and that if appellant would give him one day's notice before presentation he (Frank) would have the money there to meet the checks.

Appellant presented one of the checks upon December 2d and received the money on it; the other two he held until about the 10th of the following January; presenting them at that time, payment was refused because Frank Clarke, the maker of them, had no funds to his credit. When appellant's note for \$1,500 to appellee became due, she brought suit thereon. Appellant pleaded and insisted upon the trial that he had a good defense thereto to all except \$500 and the interest thereon. Appellee obtained judgment for the full amount of the note, from which judgment appellant prosecutes this appeal.

Messrs. GRIFFIN & WILE and OLIVER & SHOWALTER, for appellant.

Messrs. BURTON & HARRIS, for appellee.

WATERMAN, P. J. Unless the testimony given by appellant upon the trial of this case is to be entirely ignored, the instructions of the court can not be justified and the judgment must be reversed. The jury, on behalf of appellee, were instructed as a matter of law, that the holder of a check must present the same at latest within banking hours on the day following the day of its delivery to such holder, and were further instructed, in substance, that if appellant did not so present the checks which he received from Frank Clarke, and that if they would have been paid had they been presented upon the day following their delivery, and that if he retained them in his possession until the said Frank Clarke became insolvent, and did not notify appellee of the refusal of the bank to pay said checks until five months after he received them, then he (appellant) was guilty of negligence in connection with said checks and must bear the loss of them himself.

The instruction as to the duty of the holder of a check to present the same on the day of its reception or the next following day is applicable as a general proposition of law to the case where a loss occurs by reason of the failure of a bank upon which the check is drawn. If the bank upon which a check is drawn remains solvent, ready, able and willing to pay the check so long as the maker has funds enough to his credit, the holder of the check is under no obligation to present it at the latest upon the day after he receives it; he may keep it for one or six months, as he sees fit, and the maker can not draw out his funds and say that he is absolved from all obligations to have the check good when presented because the holder did not present it upon the day of or on the day following its delivery. So, in this case, if appellant, instead of receiving her son's, had received checks made by appellee herself, the bank, as it did, remaining perfectly solvent, it would have been a matter of utter indifference to appellee whether appellant presented the checks upon the day or the day after he received them, or kept them to suit his own pleasure; she would have been bound to have had the money there to meet

Shackelford v. Clarke.

them whenever they were presented. By receiving the note of appellant for \$1,500, appellee became bound as a consideration of the same, to give him a like amount. She made her son her agent to take this money to appellant and to bring back his note to her. Her son, instead of taking to appellant his mother's check to his order which she had given him, took to appellant his own checks. It was, to be sure, the case that, as appeared by an examination of the books of the bank, the checks of her son at the time he gave them to appellant were good, and would have been paid upon presentation on that or the following day, and if nothing had been said at the time these checks were received by appellant, a presumption might arise that a novation had taken place, and that appellant had received the checks of her son in discharge of her obligation to him (appellant); but according to the testimony of appellant, appellee never gave to him the \$1,500 to which he was entitled from her for his note. She only gave, according to his statement, her son's three checks, as to one of which he was told he could draw the money at once. As to the other two, he was told that the maker thereof had no money in bank to pay the same; that when he (appellant) wanted the money upon these two, he was to give notice to appellee's son, and she would immediately place the money in bank to make the checks good, and that in the meantime he (appellant) need not pay any interest on the money thus withheld.

The instructions given for appellee, which entirely ignore the phase of the case presented by appellant's testimony, were erroneous. According to the testimony of appellant, appellee never gave him the \$1,500 to which he was entitled. She merely gave him one good check for \$500 and two, each for a like sum, which he was told were not good and which he was asked not to present until after he had notified her son, and which, when presented at the expiration of forty days, were worthless.

For the error indicated the judgment is reversed and the cause remanded.

Reversed and remanded.

43 622
141 408

CHICAGO & CALUMET ROLLING MILL COMPANY

V.

DANIEL B. SCULLY.

Real Property—Title Held in Trust—To Be Transferred to Cestui que Trust on Repayment of Expenses—Form of Decree.

In the case presented, it being established that appellee had taken title to land in trust for appellant, under an agreement to transfer the title to it on payment of his expenses within a reasonable time, which time had long since elapsed, this court holds as correct, a decree ordering appellant to pay the expenses incurred by appellee by a time fixed, otherwise appellee's title to become absolute, a sale being unnecessary.

[Opinion filed February 9, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

The decree in this case finds that appellee holds the title to certain premises in trust for appellant; it also finds that appellee took such title under an agreement with appellant, the intent and meaning of which was that it should pay him the sums he paid in acquiring such title within a reasonable time, and that such reasonable time has long since elapsed. The court therefore ordered that appellant pay such sums so paid, with interest thereon, by March 2, 1891, and that thereupon appellee convey the said premises to appellant, and that in default of such payment the title of appellee to the said premises become absolute. Appellant objects to that portion of the decree which fixes the amount it is to pay, insisting that the sum of \$19,280 is improperly included therein; and appellant also insists that in default of payment the court should have ordered the premises sold, leaving in appellant the statutory right of redemption.

Messrs. KNIGHT & BROWN, for appellant.

Mr. ARNOLD TRIPP, for appellee.

WATERMAN, P. J. In reference to the amount to be paid

by appellant, it is unnecessary to say more than that as that part of the decree depends entirely upon the view that is to be taken of the facts of the case, we see no reason for interfering with the conclusions of the chancellor in that regard.

As to the order that the sum fixed should be paid by March, 1891, and that in default thereof the title of appellee become absolute, that portion of the decree is based upon the evidence and the finding in substance that all the money for the conveyance under which appellee obtained title to the property in question, and under which appellant derives all its rights in and to such property, was paid by appellee. Save for the payments made by appellee, appellant never had any title to these premises. The case is not, therefore, one in which appellant has pledged something to secure its promise to pay, but is rather one where it induced appellee to pay for and take title to property, giving to it an opportunity within a reasonable time to acquire from him the title he had. Appellee did not go into court asking to have a mortgage foreclosed; on the contrary appellant sought to enforce what it insisted and now insists, was its right to pay for and take title to a piece of property. By what rule of equity, this price being long since due, is appellant entitled to have the property sold and appellant have twelve months more in which to determine whether it will take the property? Admitting, as is insisted, that Scully was a mortgagee, the practice is not as is contended, that a sale must be ordered.

Upon a bill filed by a mortgagor to redeem, there should not be any order of sale; the decree for the complainant in such case is that he pay within a short time, fixed by the court, and that in default thereof, his bill be dismissed. 2 Daniell's Ch. Pr. 644; Jones on Mortgages, Sec. 1106; 2 Barbour's Ch. Pr. 199; Bremer et al. v. Calumet Dock Co., 127 Ill. 464; Decker v. Patton, 120 Ill. 464; Pilmon v. Thornton, 66 Me. 469. The form of decree entered in this case has been approved in Bremer et al. v. Canal & Dock Co., *supra*, and in Kirchoff v. Union Mut. Life Ins. Co., 33 Ill. App. 607-613, which last mentioned case was affirmed in 133 Ill. 368-381. The decree of the Superior Court is affirmed.

Decree affirmed.

ROBERT S. INGALLS

V.

JOSEPH C. ALLEN.

Verdict—Remittitur—Special Interrogatories—Practice.

1. Although there were several disputed items included in a verdict, the fact that the trial court did not, in ordering a *remittitur*, specify to which item it applied, does not constitute an error for which this court will, upon the case presented, reverse the judgment.

2. Special interrogatories should be single and not relate to evidentiary facts merely.

3. Where a jury fails to answer special interrogatories, counsel should call attention of the trial court to the fact and move that the jury be sent back to answer them.

[Opinion filed February 9, 1892.]

APPEAL from the Circuit Court of Cook County; the Hon. R. W. CLIFFORD, Judge, presiding.

Mr. FRANK J. CRAWFORD, for appellant.

Messrs. D. J. & H. D. CROCKER, for appellee.

Per Curiam. This case was in this court before and is reported in 33 Ill. App. 458. The issues of fact presented by the record are substantially the same now as on the former appeal, and are sufficiently stated in the former opinion. On appeal to the Supreme Court, the former judgment of the Circuit Court and of this court was reversed for error in an instruction given on the trial.

There is now no complaint that the court committed any error in giving or refusing instructions, and there is an irreconcilable conflict in the evidence on every issue of fact presented for the determination of the jury. Upon none of said issues can it be said that the evidence so preponderates in favor of appellant as to justify the conclusion that the verdict

ought to be set aside. Two juries have reached the same result on substantially the same evidence, and this result has been acquiesced in by two judges who saw and heard the witnesses so far as they testified in open court. The jury, as appellant contends, wrongfully included in their verdict the sum of \$150 commissions to appellee for selling appellant's farm in Kansas. The court required a *remittitur* of \$150 from the verdict and rendered judgment for the verdict thus reduced. Appellant contends that this *remittitur* did not cure the wrongful allowance of this item.

The *remittitur* indicated that there was an item of \$150 as to the allowance of which the trial court did not agree with the jury. Consideration of the record leads to the conclusion that the item the court rejected was the one for commissions for sale of the Kansas farm. Appellant says that there was dispute as to the other \$150 items and that it can not be told what one the court rejected. It is not perceived how the failure to indicate the particular item to which the *remittitur* relates can injure appellant. The reduction of the verdict is in his favor, and there is nothing in the case which indicates passion or prejudice on the part of the jury. The action is for wages and not for punitive damages, and when the plaintiff's claim is in assumpsit for several different items, the rejection by the court of some item which the jury have allowed is no impeachment of the general verdict.

Complaint is made that the court did not submit certain special interrogatories to the jury as asked by appellants, but modified them so as to leave out some point on which a finding was requested. We are of the opinion that the modifications by the court of the questions to be submitted were proper. The interrogatories as asked were faulty in joining two or three questions requiring different answers in one interrogatory, some of the questions joined, with others, relating to evidentiary facts merely. If such special questions ever serve any just purpose, it can only be when they are single and therefore simple and not confusing. That the jury did not fully answer the second and third special requests can not be availed of now. Counsel should have called attention to that when

the verdict came in, and moved to have the jury sent back to answer fully.

There is no error in the record which authorizes the reversal of the judgment and it will therefore be affirmed.

Judgment affirmed.

43 626
143 197

43 626
51 58
43 626
67 571

FRANCIS T. WHEELER ET AL.

V.

PULLMAN IRON & STEEL COMPANY ET AL.

Corporations—Mismanagement of Corporate Business by Officers—Bill for Receiver—Allegations Must Be Specific.

Upon a bill filed, seeking to take the management of a corporation out of the hands of its officers, to have a receiver appointed and an accounting with its creditors, its affairs wound up and its assets distributed among its stockholders, upon the ground that its affairs were not being managed in the interest of all its stockholders, but for the benefit of other corporations, with which a person owning a majority of the stock of the company in question was connected, this court holds, that to sustain such a bill, the allegations should have been specific and definite in the charge of fraudulent mismanagement, so that the court could see that the charges are not the mere conclusion of the pleader.

[Opinion filed February 9, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. HENRY M. SHEPARD, Judge, presiding.

The bill in this case sets forth that about October 8, 1883, there was organized a corporation known as the Pullman Iron & Steel Company, with a capital stock of \$500,000, consisting of 5,000 shares of \$100 each; that in payment for said stock, there was conveyed to the company a certain patent for making railway spikes; that afterward the owners of the stock, to whom the same had been issued, donated one-half of the same to the company, to be used as a working capital, and of

Wheeler v. Pullman Iron & Steel Co.

this treasury stock a portion was sold, in all about 1,625 shares, for which the company received \$100,000, of which treasury stock the complainants, appellants, each purchased \$5,000, which they have ever since owned; that the company thereafter erected works, including a rolling mill in Pullman, for the manufacture of spikes under said patent; that it was soon after found that the machinery purchased for the manufacture of spikes would not do the work, and their manufacture was substantially abandoned, and the principal business of the company became the manufacture and sale of bar iron; that there was invested in the company's plant about \$116,000, which was \$16,000 more than the money on hand. For the purpose of meeting this deficit and to provide a fund to operate the works, the company issued bonds to the amount of \$100,000, securing the same by a mortgage upon all its property. Only \$25,000 of the bonds were actually disposed of, for which the company received the sum of \$25,000; that shortly afterward the company commenced to borrow money from the Pullman Loan and Savings Bank, and so continued to do until it owed the bank about \$56,500, and by resolution of the board of directors, in December, 1886, the remaining \$75,000 of bonds were ordered to be delivered to the Pullman bank as security for its claim; that in September, 1885, the company owed the Pullman bank about the same amount it still owes, and its affairs being in a desperate condition, George M. Pullman caused the Pullman Palace Car Company to give the Pullman Iron & Steel Company a line of credit, whereby it was enabled to purchase materials and continue in operation, and that such state of affairs has continued up to this time, by virtue of which the Pullman Iron & Steel Company has been enabled to make large purchases of iron and other materials, and to build extensive additions to its works, whereby its indebtedness has been very largely increased.

That George M. Pullman, who is and has been from the beginning, the controlling stockholder of the Pullman Iron & Steel Company, is the president of the Pullman Palace Car Company and the president and principal stockholder of the Pullman Loan and Savings Bank, and that he has ordered and

directed the entire business of the Iron & Steel Company almost solely for the benefit of the Palace Car Company, and dictated the prices at which the Iron & Steel Company should furnish its produce to the car company, which prices were so low that little or no profit was realized; that the Iron & Steel Company would have realized large profits had it been allowed to manufacture bar iron and sell to the trade at ruling market prices, and that it would then have been enabled to discharge or largely reduce its indebtedness, but that it has not done so but is irretrievably and hopelessly insolvent, with liabilities in excess of \$300,000, about \$180,000 of which, it is claimed by its officers, is due to the Palace Car Company; that of the stock of the Pullman Iron & Steel Company, said George M. Pullman is the owner of 2,691 shares thereof; that the patent transferred to the company in ostensible payment of subscriptions to its capital stock is worthless, and has been abandoned by the company; that upon a fair accounting between the Iron & Steel Company and the Palace Car Company, based upon the actual market price of iron furnished, the alleged indebtedness to the Palace Car Company would be so reduced that complainant's stock would have some value which they desire to save for themselves.

That all of the officers of the Iron & Steel Company hold their positions entirely by direction of said George M. Pullman and subject to his absolute control, and that all of them are in the employment and pay of the Palace Car Company, none of said directors and officers having any pecuniary interest in the said Iron & Steel Company.

The bill prays that an accounting may be taken as between the Iron & Steel Company on one hand, and the Pullman Palace Car Company and the Pullman Loan and Savings Bank on the other, so that its exact indebtedness to each may be ascertained; that the corporation, the Pullman Iron & Steel Company, may be dissolved and a receiver appointed for it, its assets marshaled, and the liabilities of stockholders ascertained; that the equities of all parties may be adjusted, and that if after the payment of the liabilities any surplus remains, such surplus may be divided *pro rata* among the stockholders.

Wheeler v. Pullman Iron & Steel Co.

The Pullman Iron & Steel Company, the Pullman Loan and Savings Bank, the Pullman Palace Car Company, the officers and directors of the Pullman Iron & Steel Company, were made defendants. They appeared and filed a demurrer, which demurrer was sustained and the bill dismissed for want of equity.

Messrs. ULLMAN & HACKER, for appellants.

Messrs. JOHN S. RUNNELLS and WILLIAM BERRY, for appellees.

WATERMAN, P. J. Briefly stated, the bill in this case seeks to take the management of the Pullman Iron & Steel Company out of the hands of a majority of the stockholders and of the officers and directors by them selected, to have a receiver appointed, an accounting had with its creditors, its affairs wound up and its assets distributed among its stockholders, upon the allegation that its affairs are not managed and have not been for its benefit and the benefit of its stockholders as a whole, but for the benefit of other corporations with which the person owning a majority of the stock of the Iron & Steel Company is connected.

The allegations are perhaps intended as a charge of fraudulent misconduct on the part of the officers and directors of the Iron & Steel Company; but as stated they do not amount to more than allegations of a want of business judgment and sagacity or a lack of attention. What is alleged is in substance that they have caused the Iron & Steel Company to sell its product at prices so low that little or no profit has been realized, and that it would have realized large profits had it been allowed to manufacture bar iron and sell the same to the trade at ruling market prices.

These allegations of stupid or fraudulent conduct on the part of the officers and directors of the Iron & Steel Company are altogether too general and indefinite to constitute the basis of a decree by a court of equity. The allegations are altogether conclusions on the part of the complainants. At what

prices the Iron & Steel Company has sold or furnished its product to the Car Company is not stated, neither is there any statement as to what amount of bar iron it has or could have manufactured and sold to other parties, nor at what price such bar iron could have been sold, or what the ruling market prices were; nor does it appear from the allegations of the bill whether George M. Pullman, who is charged to have been and to be the controlling stockholder of the Iron & Steel Company, has knowingly or intentionally caused that company to furnish its product to the Car Company at prices less than what its product could have been sold to the trade for, or whether such action upon his part has been through mere inadvertence, lack of proper judgment or a want of knowledge of what the ruling prices for such product were, and the prices at which such product could have been sold to the trade.

It may be entirely true that the course of the business of the Iron & Steel Company has been such that its work has been in its result as a profit almost solely for the benefit of the Palace Car Company, and yet such result have been brought about, not by any fraudulent conduct on the part of said George M. Pullman, by his or its officers intending to control the Iron & Steel Company so that its operations should not be for its benefit, but should be for the benefit of the Palace Car Company; but that such unfortunate result, so far as the Iron & Steel Company is concerned, has been brought about simply by his and their lack of knowledge of the ruling market prices or his lack of business judgment or sagacity, shown by their failing to sell the product of the Iron & Steel Company at the ruling market prices.

If the conclusions of the complainants, set forth by this bill, are based upon actual facts, no reason is shown for not stating such facts so that the court, by an inspection of the bill, could have seen that the Iron & Steel Company had been selling its product, not merely at prices so low that little or no profit was realized, which is a very common thing, both with individuals and corporations, but had sold its product at prices materially below the ruling market prices for such goods.

If the allegations of the bill as to its indebtedness and the

Wheeler v. Pullman Iron & Steel Co.

value of its assets are true, then it would seem that its creditors have a much greater interest in its management than these complainants can possibly have. None of these creditors, whose claims aggregate more than \$300,000, are making any complaint as to the management of the company. It does not appear that any judgment has ever been obtained against it, or that it is not promptly meeting all its bills. It is doing a large business and lessening its liabilities. It is quite apparent that to take, under such circumstances, the control of its affairs out of the hands of a majority of its stockholders and put it in charge of a receiver might greatly jeopardize the interests of its creditors and result in a large loss to them.

While it is true that the complainants represent but one hundred out of 5,000 shares, yet it is their right to have the affairs of the corporation honestly administered for the benefit of its stockholders, and if they are being intentionally not so administered, they are entitled to relief in a court of equity; but in asking for such relief they should so specifically set forth the acts of mismanagement, which, if taken as they desire to have them taken, amount to charges of fraud, that the court can see from a reading of the bill that if the matters and things therein specifically set up are true, its affairs are, by its officers and directors, intentionally and fraudulently mismanaged, and that the allegations of fraudulent mismanagement are not mere conclusions of the pleader.

Whether, in the case of a corporation doing business, meeting all demands against it promptly, not charged to have done any acts for which its charter might be forfeited, a receiver will, at the instance of stockholders, be appointed and the corporation wound up, upon charges of fraudulent mismanagement, or whether in such case the court, declining to appoint a receiver, will compel the officers of the company to account for their breach of trust and enjoin the doing of such further fraudulent acts, are questions which under the allegations of this bill we are not called upon to discuss.

The decree of the Superior Court dismissing the bill is affirmed.

Decree affirmed.

43	632
55	251

HUGH CHITTICK AND ANN CHITTICK

V.

TOWN OF LAKE.

Judgments and Decrees—Pleading—Damages—Action for Flooding Land.

1. Where damages are assessed upon a count in which entire damages are claimed from both actionable and non-actionable causes joined, judgment should be arrested.

2. In the case at bar, there being no sufficient allegations or proof to show that plaintiffs had suffered any damage because of the acts of defendant which they would not have suffered in any event, the judgment for defendant must be sustained.

[Opinion filed February 9, 1892.]

APPEAL from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding.

Messrs. BARNUM & BARNUM and CALDWELL & PIERSON, for appellants.

Messrs. JOHN S. MILLER and GEORGE A. DUPTY, for appellee.

GARY, J. The appellants sued the town for flooding two separate tracts of land. The two counts of the declaration only differ as the application of the averments to the separate tracts required. After averring occupation and cultivation of one of the tracts the first count proceeds:

“That the natural drainage from said premises is through and by certain ditches or drains, theretofore constructed and maintained by the said defendant through and on the public street or highway, the property of said defendant known as Ashland avenue lying east of said premises, which said ditches or drains it was during all the time from the date first above mentioned hitherto the duty of said defendant to constantly and at all times keep and maintain free and clear of all obstruc

Chittick v. Town of Lake.

tions. That the said defendant, well knowing its duty in the premises, on, to wit, the 2d day of November, A. D. 1883, and from time to time thereafter and up to the commencement of this suit, negligently and unlawfully permitted the said ditches or drains to be obstructed and filled up, thereby preventing the free flow of the water from the plaintiffs' said premises, and on, to wit, the said 2d day of November, 1883, and from time to time thence hitherto, opened up and constructed another drain or ditch in said Ashland avenue south of the said premises so as aforesaid occupied by the plaintiffs, causing thereby an increased flow of water on and upon said premises of plaintiffs, by reason whereof plaintiffs' crops," etc., stating damage.

It is not now contended that any duty rested upon the town to keep highway ditches in condition to drain the lands of adjoining occupants. But the court instructed the jury that the only negligence they were to consider was in permitting such ditches to be filled up, and refused instructions requested by appellants as follows:

"The jury are instructed that a municipal corporation can not lawfully, by artificial trenches, channels or otherwise, increase the volume of water that would naturally flow or collect upon a field or lot; and if the jury believe from the evidence that the defendant constructed a ditch or drain so that on November 2, 1883, and from time to time since and prior to September, 1886, the volume of water that would naturally collect or flow upon plaintiffs' premises was greatly increased, and that by reason of such increased volume of water the plaintiffs' premises were flooded and plaintiffs' property damaged, then the jury should find for the plaintiffs to the amount which the proof shows such loss to be." "If the jury believe from the evidence that the plaintiffs have made out their case as laid in their declaration, they must find for the plaintiffs."

Though an instruction in the form of the last of these has been held not erroneous several times, it has never met a very emphatic approval, and is absurd in principle. *Pennsylvania Co. v. Versten*, 41 Ill. App. 345. On the whole evidence it is pretty clear that, without any ditches that the town opened, the crops

of the appellants would have suffered just as they did, and so the town has not injured the appellants. *Crohen v. Ewers*, 39 Ill. App. 34. Their complaint is that, by preventing the free flow through some ditches and causing an increased flow through another, they were damaged, not by the one cause, but by both, and that is alleged without any local description or averment (except that natural drainage was through a ditch) by which any relation of cause and effect can be traced. Now, if damages were assessed upon such a count, entire damages from actionable and non-actionable causes joined, judgment would be arrested. *Sicklemore v. Thistleton*, 6 M. & S. 9; *Sheen v. Pickie*, 5 M. & W. 175. The statute, Sec. 57 Practice Act, does not touch this matter. *Morrow v. Governor, Hardin (Ky.)*, 489.

On the whole case no cause of action is stated in the declaration nor proved by the evidence. Neither one nor the other shows that, taking together all that the town has done, the appellants have been worse off than they would have been if the town had done nothing.

Judgment affirmed.

THE NORTH CHICAGO STREET RAILROAD COMPANY
V.
EGBERT C. COOK.

Street Railroads—Personal Injuries Received in Getting Upon Car—Evidence—Degree of Care Required on Part of Company—Error, When Not Reversible—Damages.

1. An action being brought to recover damages for a broken arm received by plaintiff when attempting to board defendant's car, this court holds that, in the absence of evidence as to amount of expenses incurred by plaintiff, it was error to tell the jury that, in assessing damages, they might consider the necessary expenses resulting from the injury.

2. A non-professional man should not be permitted to tell what pain and inconvenience he suffered as the result of the injury.

3. The stopping of a street car is an invitation to would-be passengers

43	634
145	551
43	634
51	324
43	634
101	*186

North Chicago Street R. R. Co. v. Cook.

to get on board, and it is the duty of the company to afford to such a reasonable opportunity to do so. The company is bound to exercise the highest diligence to enable parties invited to board its cars to get upon, to ride in, and to leave its cars safely.

4. Where a person boarding a car is injured by the premature starting thereof, it is no excuse for the company that the car was signaled to start by another passenger and not by its servants.

5. Where, upon the whole record, it is obvious that the plaintiff is entitled to recover, and the damages assessed are reasonable, this court will, notwithstanding the fact that improper evidence was admitted, affirm the judgment in plaintiff's favor.

[Opinion filed February 9, 1892.]

APPEAL from the Circuit Court of Cook County; the Hon RICHARD W. CLIFFORD, Judge, presiding.

Appellee, an old and infirm man, standing in the street, signaled one of appellant's cars to stop and let him on. The car passed him a short distance and stopped to let a woman get off. Appellee, being beckoned by passengers upon the rear steps to come on, hobbled along, and it would seem caught hold of the hand rail; he was not very active and ere he could step up, some one, a passenger apparently (the conductor denies that he did), gave a signal to go on, in consequence of which the car started, pulling appellee off his feet and leaving him lying in the street. The car stopped, the conductor and passengers ran back and it was found that appellee had sustained a serious injury. When appellee signaled the car to stop, and when he endeavored to get on, the conductor was on or near the front platform collecting fares.

The jury returned a verdict of \$1,625 for the plaintiff; the court gave judgment for this sum and the defendant below appeals.

MESSRS. W. J. HYNES, EDMUND FURTHMANN, and H. H. MARTIN, for appellant.

MR. SAMUEL W. PACKARD, for appellee.

WATERMAN, P. J. The very able briefs presented by appel-

lant show what we regard as errors committed upon the trial of this cause. In the absence of any evidence showing what amount of expense appellee had paid or incurred, we do not think that the jury should have been instructed that in estimating plaintiff's damages they might include the necessary expenses which could be treated as a necessary result of the injury. It is true, as is urged by appellee, that there are some things which a jury may consider, in the absence of direct testimony establishing the fact; but neither the average man nor the average juror has had such experience that without evidence he can say what the necessary expenses attending a broken arm are; in endeavoring without evidence to estimate as to such a matter, he must enter upon the field of mere conjecture. *C. B. & Q. R. R. Co. v. Hale*, 83 Ill. 360; *I. C. R. R. v. Frelka*, 9 Ill. App. 605; *Joliet v. Henry*, 11 Ill. App. 54; *Reed v. R. R. Co.*, 55 Iowa, 23; *Duke v. R. R. Co.*, 99 Mo. 347. Nor should appellee have been permitted to state what pain and inconvenience he had suffered *in consequence of* the injury. Appellee was not an expert qualified to answer pathological questions.

There is great danger of misleading in calling attention in instructions to particular bits of evidence; undue importance may thus be given to what is of little consequence or perhaps of no consequence at all, when considered with all other things shown. Some of the instructions are objectionable in this and other respects, but taking the instructions as a whole, in which way they must be regarded, we do not think that the jury was misled to the prejudice of appellant. The answers to the pathological question it is not likely did the defendant any harm; indeed, that a man would suffer pain and inconvenience from a broken arm is one of those things which a jury may infer without evidence.

Upon the merits, it is clear that the plaintiff was entitled to a verdict in his favor. Appellant's car had stopped; it was not so crowded but that more passengers might get on; indeed, there is no pretense that appellant either gave notice that no more could get on or that it did not desire to receive more passengers. Under such circumstances, the stopping of the car

was an invitation to any person who desired to become a passenger to get on board; and it became the duty of appellant to afford such persons a reasonable opportunity to do so. Appellant is bound to exercise the greatest diligence to enable parties so invited, to get on, to ride in and get off its cars without injury. When this car stopped and appellee, having hold of the hand rail, was about to step up, for the car to start ere he had a reasonable opportunity to get safely on was presumptively negligence upon the part of appellant. What is a reasonable time for a person to get upon a car, depends to some extent upon the age and agility of the party endeavoring to do so. It is said by appellant that none of its servants gave the signal for the car to start; that the conductor was on the front platform, where his duties as a collector of fares required him to be; that consequently he did not see appellee, and knew nothing about him until after he was injured. Suppose all this to be so; how does it relieve appellant from the presumption of negligence? Appellant being bound to exercise the greatest diligence to enable appellee to enter its car without being injured in his attempt to do so, it can not plead the attention of its servants to other matters as an excuse for their want of care for his safety; nor for their failure in this regard is it a sufficient reason to say that its bell cord was so arranged that a passenger could and did signal the car to go on; all that human foresight and skill could do for the protection of appellee it was bound to do, and the evidence does not show that it had exhausted the practical resources of ingenuity, care and skill in providing for the safety of this old man.

Under the evidence shown in this record, had there been a judgment for the defendant it would have been our duty to set it aside. We ought, then, not to reverse this judgment unless we believe that by the errors committed by the trial court appellant has been prejudiced. If the judgment were much larger than it is we might feel that the result of the trial had been affected by such errors; but the verdict appears to have been the result of deliberation, not of passion or prejudice, and is no larger than in our opinion would be rendered upon a trial free from error.

In this class of cases the public have a certain interest; they bear a large portion of the expense of the litigation. A result, so far as appellant is concerned, having been reached which is as favorable to it as any that can be expected, and which does not appear to us unjust, we see no sufficient reason for granting a new trial.

Interest reipublicae ut sit finis litium.

The judgment of the Circuit Court will be affirmed.

Judgment affirmed.

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141 391

JOSEPHINE CHESLEY HODGES

V.

WALTER THOMAS NASH.

Practice—Continuance—Insufficiency of Affidavit for—Negotiable Instruments—Accommodation—Paper—Defenses to Action on.

1. On an application for a continuance on the ground of the absence of a material witness the affidavit must state that the party has no other witness by whom he can prove the facts stated in the affidavit as completely as by the absent witness.

2. Accommodation notes are made to be used, and in the hands of one who, before due, *bona fide* receives them for value, are as good as any other notes.

[Opinion filed February 9, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Mr. EDMUND FURTHMANN, for appellant.

Messrs. SWIFT, CAMPBELL & JONES, for appellee.

WATERMAN, P. J. When this cause was called for trial, appellant presented an affidavit for a continuance which failed to state that she had no other witness by whom she could prove the facts stated in her affidavit as completely as by the

Greenlee v. Goldstein.

absent witness; for this and other reasons the court properly refused to continue the case. *Jarvis v. Shacklock*, 60 Ill. 378.

It is urged by appellant that the matters and things set forth by appellant in her affidavit constituted a good defense to the action. The suit was upon a promissory note made by appellant and was brought by an indorsee. The defense set up in the affidavit was in substance that the note was made for the mere accommodation of the payee and that the plaintiff was aware of such fact. This, if true, did not constitute a defense. Accommodation notes are made to be used, and in the hands of one who before due *bona fide* for value receives them, are as good as any other notes. *Daniel on Neg. Instruments*, Sec. 726; *Cronise v. Kellogg*, 20 Ill. 11. There was nothing to show that appellant had or would have been able to present a defense to the action if the continuance had been granted. In brief, there is nothing to show that appellant had any defense to the action.

The judgment is merely what the plaintiff was then, and, so far as appears, is now entitled to, and is affirmed.

Judgment affirmed.

ROBERT L. GREENLEE ET AL.

V.

ABRAHAM GOLDSTEIN.

Trespass Quare Clausum—Damages.

Where plaintiff, in an action of trespass *quare clausum*, has never regained possession of the land in controversy, he can recover damages only for the entry or entries. *Harding v. Sandy*, 43 Ill. App. 442, followed.

[Opinion filed February 9, 1892.]

APPEAL from the Circuit Court of Cook County; the Hon. S. P. McCONNELL, Judge, presiding.

Mr. H. W. MAGEE, for appellants.

MESSRS. LYNDEN EVANS and FREDERICK ARND, for appellee.

GARY, J. This was an action of trespass *quare clausum* by the appellee against two of the appellants, named Greenlee, and two named Wells. There was a verdict against the Greenlees, and no verdict for or against the Wellses. The appellee, then, against their objection, dismissed as to them. They did not except, but joined in a motion for a new trial, and in this appeal insist upon that action as irregular. If the case of Wilderman v. Sandusky, 15 Ill. 59, shall be adhered to, they have no cause of complaint. The verdict and judgment against the Greenlees is a bar for the Wellses.

The case is one of boundary between lots. The evidence tends to show that the Greenlees erected a building upon the lot to which they had title, but in so doing took in some ground which the appellee was occupying under a deed to the adjoining lot. If, by lapse of time, that occupation had ripened into a title, the jury was the tribunal to find the fact. It could not be assumed by the court to be the fact. The excessive damages, \$1,000, would be ground for reversal of this judgment, if there were no other error. The appellee has never regained possession of the strip in controversy, and can, therefore, in any event, have damages only for the entry or entries. C. & W. I. R. R. Co. v. Slee, 33 Ill. App. 416, 420, two cases. If there were entries at different times between which appellee regained possession, he might, in one action, with a *continuando*, have redress for all. 2 Waterman, Trespass, Sec. 929. There seems to be a flood of cases recently relying upon Reeder v. Purdy, 41 Ill. 279. In this case we will only refer to what we said about that in Harding v. Sandy, 43 Ill. App. 442. For the appellee here the same instruction in substance which we, in Harding v. Sandy, held to be error, was given, and we adhere to that decision.

The judgment against the Greenlees only is reversed and the cause remanded. No order as to the Wellses is necessary, as they are out of the case.

Reversed and remanded.

Shearer v. Pacific Express Co.

WILLIAM W. SHEARER ET AL.
V.
THE PACIFIC EXPRESS COMPANY.

43	641
160s	215
43	641
64	230

Carriers—Express Companies—Delivery of Package to Wrong Party.

Express companies are insurers for the safe delivery of packages intrusted to their care and nothing can excuse them from this obligation except the act of God or of the public enemy. No circumstance of fraud, imposition or mistake will excuse the delivery, by a common carrier, of a package to the wrong person.

[Opinion filed February 9, 1892.]

APPEAL from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding.

Messrs. BARNUM & BARNUM, for appellants.

Messrs. JAMES FRAKE and W. W. MORSMAN, for appellee.

MORAN, J. Appellants had, for a number of years prior to the happening of the circumstances giving rise to this case, conducted business at the stock yards in Chicago, under the firm name of W. W. Shearer & Co. For some time prior to April 22, 1889, said firm had dealings with one J. C. Stubblefield, who was engaged in buying stock in Kansas, Missouri and Texas, and who from time to time applied to Shearer & Co. for an advance of money, which they sent him in the form of drafts, letters of credit, and money by express. In April, 1888, said J. C. Stubblefield was at Chetopa, in Kansas, and telegraphed appellants for \$700, and it was sent to him in a draft, and he was there identified at the bank and received the money for the draft; Stubblefield was acting for himself in the purchase of cattle, and not as an agent for appellants. On April 21, 1889, about midnight, this J. C. Stubblefield arrived in Chetopa, Kansas, from Texas. He got off the train and went to a hotel, a short distance from the depot, but did

not register his name at the hotel, giving as a reason, that he was tired and desired to go to bed. At the same time, and from the same train, another man got off at Chetopa, and went to another hotel in the town farther away from the depot than that to which J. C. Stubblefield went. This man claimed to be named J. C. Stubblefield, but as the facts show, for a fraudulent purpose. The genuine J. C. Stubblefield the next morning met an acquaintance in the town, and took a ride with him in a buggy, and some time during the afternoon left Chetopa on a freight train for Parsons, and went from there to Coffeyville. The other man, whom we shall designate as the impostor, went to the telegraph office in the depot at Chetopa, and sent the following telegram:

“CHETOPA, KANSAS, April 22, 1889.

To W. W. Shearer & Co., Union Stock Yards, Chicago.
Express me \$4,000 to-day; Chetopa. Answer.

J. C. STUBBLEFIELD.”

The impostor had not registered at the hotel at which he stopped, which was kept by a Mr. Davenport. After having sent the above telegram to the appellants he returned to the hotel, and said, “Mr. Davenport, if a telegram should come here to J. C. Stubblefield, if there are any charges on it, you pay it, and I will settle with you.” Davenport asked him if that was his name, and he replied in the affirmative. Davenport then informed him that a messenger boy had been there with a telegram for J. C. Stubblefield, and told him where he could find the boy. Soon after, the impostor informed Davenport that he had received the telegram. This telegram was the answer from W. W. Shearer & Co. to the message sent them in the morning, and was as follows:

“UNION STOCK YARDS, CHICAGO, ILL., 22.

To J. C. STUBBLEFIELD: Sent money as ordered to-day.
Wire me full particulars on receipt of this. W. W. SHEARER.”

In reply the impostor sent the following:

“CHETOPA, KANSAS, 22.

To W. W. SHEARER & Co.: Bought 240 corn fed Texas
Top of 300 at \$20 a head. J. C. STUBBLEFIELD.”

During the forenoon of April 22d, the impostor had given

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orders to the railroad company for eleven stock cars to be set on the track for his use for the purpose of shipping cattle to be shipped by him on the 24th of April. He informed Davenport that he was buying cattle to ship from Chetopa, and that he was expecting money from Chicago with which to pay for them; that he had ordered the money from plaintiffs by telegraph. On the morning of the 24th he called on the agent of the appellee Express Co., and asked if there was a package there for Stubblefield. The agent asked him if his name was Stubblefield, to which he replied, "It is." Being asked what were his initials he replied J. C. The agent then said there was a package for J. C. Stubblefield, and asked the impostor, "What identification have you?" He then took from his pockets two accounts of sales, and a telegram, and handed them to the agent. The telegram was the one signed by Shearer & Co., and addressed to J. C. Stubblefield at Chetopa, a copy of which is above set out. The accounts of sales show transactions between J. C. Stubblefield and appellants wherein appellants have sold in Chicago cattle consigned to them by J. C. Stubblefield. The agent then asked the impostor, "Is there anybody here with whom you are acquainted?" To which he replied, "Nobody except the landlord." The impostor then brought in Davenport, the landlord, and stated that he came after the package. The agent inquired of Davenport if he was acquainted with this man. Davenport said, "I am." The agent then asked, "Who is he? what is his name?" Davenport replied, "J. C. Stubblefield." The agent asked, "How do you know that is his name?" Davenport said, "At least that is the only name I ever knew him by; besides he has been stopping at my house several days; nearly a week. He is also on the trade with some parties west of the town for some stock. He has got the cars ordered; they are now on the track at the depot." The agent then asked the imposter, "What are you looking for?" He said, "A package of money." The agent asked, "How much?" He answered, "\$4,000 from W. W. Shearer & Co., Chicago, Ill." The agent then delivered the package of money to the impostor, he receipting for it in the name of

J. C. Stubblefield, and Davenport signing his own name as identifying Stubblefield. The impostor then directed Davenport to retain a room for him as he would be back that night, and took a train for Coffeyville, and was not thereafter seen in Chetopa. The genuine J. C. Stubblefield left Coffeyville on April 24th, and came to Chicago, where he at once called at the office of the appellants, and it was then discovered that a trick had been played, and steps were taken by Shearer and Stubblefield to stop the payment of the money, but it was then too late.

On the trial before the court without a jury there was a finding and judgment in favor of the express company. The rule as to the liability of express companies to safely deliver matter intrusted to them is thus stated by our Supreme Court: "They become insurers for safe delivery; being so, nothing can excuse them from their obligation safely to carry and deliver, but the act of God or the public enemy. * * * Express companies have so many opportunities to do wrong, so many temptations are spread out before their employes, and such is the necessity of intrusting them, every presumption should of rights be against them, and should prevail unless rebutted."

Hutchinson on Carriers, Sec. 344, thus states the rule with reference to delivery: "No circumstances of fraud, imposition or mistake will excuse the common carrier from responsibility for a delivery to the wrong person; the law exacts of him absolute certainty that the person to whom the delivery is made is the party rightfully entitled to the goods, and puts upon him the entire risk of mistake in this respect, no matter from what cause occasioned, however justifiable the delivery may seem to have been, or however satisfactory the circumstances or proof of identity may have been to his mind, and no excuse has ever been allowed for a delivery to a person for whom the goods were not directed or consigned."

In support of this rule the author cites numerous cases in which the carrier has been held responsible for a delivery to a person not entitled to the goods, and among them many cases resembling in their facts and circumstances the case now under consideration.

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In *American Express Co. v. Fletcher*, 25 Ind. 492, a person claiming to be J. O. Riley applied at a telegraph office to have a message sent, signed J. O. Riley, requesting a remittance of money to his address. The message was sent, and the money forwarded by an express company, as requested, and received by the agent of the company at the place from which the message was sent. The same person was express agent and telegraph operator, and he paid over the money to the person who had sent the telegraph message. It turned out that this person was a swindler. It does not appear from the case that there was a real J. O. Riley, but it is assumed that there was. It was held that the express company was liable in delivering the money without further proof of the person to whom it was delivered being the right party than the mere fact that he had sent the dispatch, in response to which the money was received.

In *American Express Co. v. Stack*, 29 Ind. 27, a person who had knowledge that certain goods were in the possession of the wife of one James Stack, and that said James Stack was absent from her, telegraphed to her in the name of her husband to send goods to his address. She sent the goods by the express company, as directed, at the same time writing a letter addressed to James Stack, at the place to which the goods had been forwarded, telling him that they had been sent as he directed. This letter came into the hands of the swindler, as he had pre-arranged. He then demanded the goods of the company, showing this letter, and describing the goods, as proof that he was the genuine James Stack. The agent refused to deliver the goods to him without further evidence of identity, and he produced to the agent of the company a person known to said agent, who stated the man's name to be James Stack, as he honestly thought it was. The goods were then delivered, and it turned out that the man was not the real James Stack to whom the goods had been sent. The company was held liable.

In *Palm v. Watt*, 7 Hun, 318, one Raleigh took the name of John M. Gillespie while temporarily staying in Texas, and

in such name wrote letters to the mother of the true John M. Gillespie, representing himself to be that person, who had not been heard from for some time, and asking assistance to enable him to return. The mother wrote a letter, and inclosed a check payable to the order of John M. Gillespie, San Saba, Texas. The letter was taken out of the office by Raleigh, and the check indorsed by him with the name of John M. Gillespie, and the money paid on it by one Ward. The indorsement was held to be a forgery. In denying Ward's right to recover on the check, it is said by the court:

“It is urged that the possession of the letter which inclosed the check, and which was addressed and written to one John M. Gillespie, enabled Raleigh the more easily to personate Gillespie, and thus deceive Ward. This is no more true than it would be in the case of any thief who had stolen a letter addressed to a third party, inclosing a check to the order of such party, and who brought the check to the bank with such stolen letter as the evidence of his identity.”

In *Sword v. Young*, 89 Tenn. 126, “one J. F. Gillenwaters, over the assumed and fictitious name of ‘Charles G. Magrauder,’ wrote to Sword & Son, of Cleveland, Ohio, to send a brick machine. The machine was shipped and came to Knoxville on the cars of the defendant company. Shortly after its arrival Gillenwaters presented the bill of lading made in the name of Charles G. Magrauder, demanded the machine, which was delivered to him, paid the freight and receipted in the name of Charles G. Magrauder. He was not required to identify himself as the consignee, nor was the bill indorsed. The court, in deciding the case, holding the carrier responsible, quote the rule as stated by Chancellor Kent, that a common carrier is in the nature of an insurer, etc., and say: “It can make no difference that the defendant carrier thought because Gillenwaters had the bill of lading that he was Charles G. Magrauder. If he was a stranger, as the proof shows him to be, it was the duty of the carrier to have required him to identify himself as the consignee, or his rightfully constituted agent. By its failure Gillenwaters was enabled to practice that fraud intended to be guarded against by the rule from

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Kent" (the obtaining of goods by false pretenses). "That Gilenwaters succeeded in deceiving the complainants by representing himself as Magrauder is no excuse for the defendants for its failure to use an effort to discover his true character. * * * There is no difference between this case and one in which a consignment has been made to an actual person, and the goods delivered by accident, mistake or carelessness to a cheat who represents himself as the real consignee. It is necessary in both to have proof of identity, or authority to receive."

Price v. Railroad Company, 50 N. Y. 213, is similar in its facts to the case last quoted. There the swindler sent a letter in the name of a fictitious firm requesting goods to the address of the firm. When the goods arrived a stranger to the defendant's agent paid the freight on them, and was permitted to take them. The person to whom they were delivered was the same person who had sent the letter signed with the name of the fictitious firm to the plaintiff, and he obtained the goods by falsely assuming to be the party to whom they were consigned. The company was held liable for failing to deliver to the right consignee, or on failing to find him, not notifying the consignor.

It will be noticed that in several of these cases the sender of the money or consignor of the goods had knowledge of a real person of the name used by the personator, and sent the goods or money on a request not coming from the real person, but sent in his name by the personator, and that the deliveries by the carriers were induced by the personators being known to them as the persons who really requested the forwarding of the goods or the money in the name of the real person. In this case there can not be the slightest doubt that Shearer & Co. supposed that the request for the money came from J. C. Stubblefield, with whom they had dealt, with whose personality they were acquainted, and to whom they had at different times prior to this date sent money. When they consigned the money, they consigned to him, and the carrier could only excuse himself by delivering it to him; that he did not deliver it to him is admitted, and that instead he did deliver it

to one who falsely personated J. C. Stubblefield both in sending the request for the money, and in receiving it from the express company. It is folly to contend that Shearer & Co. intended the money to be delivered to a man who sent them a dispatch signed by the name J. C. Stubblefield, and neither did they direct it to be so delivered. They designated the consignee by his true name and by so doing directed the delivery of the money to him only. It was the duty of the express company to strictly observe directions and deliver it to J. C. Stubblefield, the consignee. A failure to do so, not induced by any negligence of the consignor, whatever the circumstances of fraud or imposition that brought it about, will not excuse the carrier. He delivers at his peril, and the question of his care or diligence, be it ever so great, is not a factor in the decision of any given case—is not to be considered—unless there is contributory negligence by the consignor. And so are all the authorities. In addition to those already cited, see *Cone v. Watkins*, 26 Kans. 691; *Southern Express Co. v. Van Meter*, 17 Fla. 783; *Winslow v. Vermont Ry. Co.*, 42 Vt. 700.

There is another class of cases where the swindler was known in his personality to the seller of the goods, to whom he falsely represented himself to be a person of a certain name, and by whom he was dealt with by said false name, and goods purchased by him consigned to him by such false name, and where to him who had so purchased the goods by the false name the carrier delivered them. In such cases the delivery is to the very person whom the consignor had in mind and to whom he intended they should be delivered, and who was known to him by the false or assumed name, and whom, in addressing the consignment, he identifies by such false name. Such cases are *Dunbar v. Boston, etc., Co.*, 110 Mass. 26; *Edmunds v. The Merchants' Dispatch Co.*, 135 Mass. 283. A different circumstance distinguishes *Samuels v. Cheeny*, 135 Mass. 278, from cases in which the carrier is held liable for a wrong delivery. In that case there were at Saratoga Springs two persons named A. Swannick, one a reputable merchant having a permanent place of business, the other a person who rented a shop and

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secured a numbered box at the postoffice. The latter wrote to the plaintiffs for a bill of goods to be consigned to him, giving his address as "A. Swannick, P. O. Box 1595, Saratoga Springs, N. Y." The plaintiffs supposed that the letter came from the responsible Swannick, though it does not appear that they knew him, or had ever dealt with him before. They consigned the goods as directed, and wrote a letter inclosing a bill for the goods to A. Swannick, postoffice box 1595. This letter the swindler received, as it came to his box, and the goods were delivered to him without any farther identification after they were offered to the responsible Swannick, who had not ordered any goods and who refused to receive them. The court held the carrier not liable, as the goods were delivered to the very person to whom they were sold and consigned, and to whom the letter inclosing the bill for the goods was addressed. *Hoge et al. v. First National Bank*, 18 Ill. App. 501, may be properly classed with *Samuels v. Cheeny*. See *U. S. v. National Exchange Bank*, 45 Fed. R. 163.

We think it clear on principle as well as authority that the delivery of the money in this case to the impostor was not a discharge of the company from the responsibility which it undertook when it received the package consigned to J. C. Stubblefield, Chetopa. The circumstances of which the impostor availed himself to impose upon the express agent were specious and were of a character calculated to inspire belief that he was indeed J. C. Stubblefield, but he was not; and however well calculated the circumstances were to deceive and impose upon the agent, they form no excuse to the company for a wrong delivery. If the impostor's fraud induced Shearer & Co. to transmit \$4,000 by express to Chetopa, consigned to J. C. Stubblefield, that was the extent of the fraud which he perpetrated on them; that he induced them to forward the money to Stubblefield was no excuse for the carrier delivering the money to him or to any one else than the J. C. Stubblefield to whom it was consigned. There is some contention by appellee that the genuine J. C. Stubblefield was in collusion with the impostor for the perpetration of the fraud.

There are in the record some circumstances which might give rise to a suspicion that J. C. Stubblefield knew more of the impostor than he now admits, but we think these circumstances too slight to support the conclusion that he was actually a conspirator with the impostor. If, however, he was in such conspiracy, we do not perceive how that fact can relieve appellee from responsibility; he was still the consignee named by Shearer & Co. to receive the money. It was not delivered to him nor upon his order, nor by his procurement evidenced in any such manner as would enable Shearer to hold him for the money. The express company have disobeyed the consignor's direction, and they have no command or authority from the consignee which justifies or excuses such disobedience. Whether Stubblefield was engaged in the attempt to defraud appellant of money or not, delivery of the money to him by the carrier would have been a fulfillment of its duty. Its contract was to deliver the money according to direction. It can not relieve itself from liability by now suggesting that the consignee to whom it failed to deliver was engaged in the effort to defraud the consignor.

It is unnecessary to consider in detail the propositions of law held and refused by the court. The view of the law which controlled the court in finding the express company not liable was in conflict with the view taken by this court, as shown in what has been above written.

The judgment of the Circuit Court must be reversed and the case remanded for new trial.

Reversed and case remanded.

HENRIETTA SWEET

V.

THADDEUS DEAN ET AL.

Husband and Wife—Conveyance to Wife—Consideration Furnished by Husband—Bill to Subject Property to Husband's Debts—Necessary Evidence—Judgment—Effect of.

43 650
55 202
43 650
63 322

Sweet v. Dean.

1. Upon the mere fact that the consideration of a conveyance to a wife is furnished by her husband, no presumption of a resulting trust arises.

2. Upon a bill to subject property so conveyed to the debts of the husband the creditors must show, either that they were creditors at the time of the conveyance, or that the conveyance was so made for the purpose of defrauding subsequent creditors.

3. Upon a bill by a judgment creditor to set aside an alleged fraudulent conveyance antedating the judgment, the judgment is not evidence that the debt existed when the suit was commenced.

4. A judgment is, for or against strangers to it, evidence only of its own existence, and affects them only by the consequences that legally flow from that existence.

[Opinion filed February 9, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. KIRK HAWES, Judge, presiding.

Messrs. MOSES & PAM, for appellant.

The bill of complaint, as well as the intervening petition, called for the sworn answers of the parties. It is useless to cite authorities upon the effect of sworn answers, as the rules are well known in this court.

There is no *legal* evidence in the record when the debt of Dean & Bader accrued, except the recovery of a judgment of April 8, 1889.

The itemized account attached to the declaration did not prove itself, and was no part of the record, even as against Mr. Sweet. *Harlow v. Boswell*, 15 Ill. 56; *Gossett v. U. M. A. Ass'n*, 27 Ill. App. 266, and other cases.

As to the law of gifts from husband to wife, and alleged fraudulent conveyances, see *Moritz v. Hoffman*, 35 Ill. 553; *Gridley v. Watson*, 53 Ill. 186.

In the latter case a judgment debtor had property sufficient to satisfy the judgment. There was no allegation in the cross-bill that Watson was insolvent, or that he purchased the property in the manner it was purchased, or conveyed it in anticipation of insolvency. See *Sweeney v. Damron*, 47 Ill. 450; *Bridgeford v. Riddell*, 55 Ill. 261; *Pratt v. Myers*, 56 Ill. 24; *Mitchell v. Byrns*, 67 Ill. 522; *Patrick v. Patrick*, 77 Ill. 555; *Yazel v. Palmer*, 81 Ill. 82.

Where there are no creditors it is competent for the husband to create a separate estate for his wife. None but present creditors can complain. *Tunison v. Chamblin*, 86 Ill. 378.

Patterson v. McKinney, 97 Ill. 42, cites *Bump on Fraudulent Conveyances*. Reference must be had to the nature and state of the property. In that case one deed was avoided, while the other was upheld.

The bill of complaint does not state any special facts warranting any relief against Mrs. Sweet. It does not even allege the insolvency of Henry Sweet, either present or impending, and simply proceeds upon the theory that Mrs. Sweet got property from her husband. *Durand & Co. v. Gray, Kingman & Collins*, 129 Ill. 9.

Mr. ARNOLD TRIPP, for appellees.

The case in 53 Ill. 186, was a case where an execution had been returned *nulla bona*, and no effort made to collect the debt, and where the proof affirmatively showed the person to be entirely solvent and possessed of property.

In the case 35 Ill. 553, the court affirms the doctrine long established, that where a debtor in failing circumstances and owing debts, deeds his property, it is presumptive evidence of fraud. In that case, however, Hoffman was a prominent business man, a banker, and paid money daily over the counter, and retained and had enough money to pay all of his debts, which is not the case at bar. Here Sweet had practically nothing left except that which was heavily incumbered, and in which no equity existed, and which in fact was all foreclosed and taken by mortgage creditors.

We contend that Sweet was bound by this return, and that it is conclusive against him as well as his wife.

We cite in support of that proposition the case of *Lewis v. Lanphere*, 79 Ill. 187. In that case the court say: "It is again urged, that a complainant in a case of this character (creditor's bill) must exhaust his remedy at law before he can resort to equity for relief. There is no doubt of the correctness of the rule, but does it appear that he has not in this case? Wm. Lewis, the debtor, when called on by the constable with

the execution, denied having money or property to discharge or satisfy it. This, then, shows that he had neither money nor property at that time. Having made the statement he will not be heard to say that it was untrue."

The demand and return in that case is precisely the same as the case at bar (see page 189). The court in that case construed the return as a refusal to turn out property and held that he could not now be heard to say that it was false.

Mitchell v. Byrns, 67 Ill. 523, was a creditor's bill exactly the same as the case at bar, and on the same state of facts the court held the bill to be good.

The precise question now under consideration has also been definitely settled in the case of Durand et al. v. Gray et al., reported in 129 Ill. and in Bowen v. Parkhurst, 24 Ill. 258.

GARY, J. On the 8th day of April, 1889, the appellees recovered in the Superior Court a judgment against Henry Sweet, the husband of the appellant, for nearly \$1,800, upon which execution was issued and returned *nulla bona*. When that suit was commenced does not appear. Attached to the declaration (common counts) was a bill of particulars of items of dates from July 26 to December 24, 1887, but no other evidence of indebtedness was put in in this case. Upon that judgment the appellees filed a judgment creditor's bill to subject to the satisfaction of it some real property conveyed by a third person to the appellant on the 29th day of September, 1887, for a consideration, as is alleged, furnished by the husband. Upon the mere fact that the consideration of a conveyance to a wife is furnished by her husband, no presumption of a resulting trust arises (2 Pom. Eq., Sec. 1039), and there is in this case no evidence of any trust by agreement of parties. If the appellees can reach the land, it must be only on the ground that the conveyance to her, and not to the husband, was a fraud upon them as his creditors. But to give them a standing upon this ground they must show that they were such creditors at the time of the conveyance, or that the conveyance was so made for the purpose of defrauding subsequent creditors. Tunison v. Chamblin, 88 Ill. 378.

It is not contended that there is any evidence of the last member of the above proposition, and therefore it is only necessary to consider whether there is any evidence of the first. There are some decisions that can not be defended, that with the aid of other evidence, not of itself sufficient, a judgment may help to make out proof against strangers to it, of the prior existence of the debt, for which it purports to have been rendered. They are cited in Sec. 605, 2 Black on Judgments. The precise question that is on this record has been decided several times in Alabama adversely to the appellees. On bills to set aside alleged fraudulent conveyances antedating the judgments, the judgments are not evidence that the debts existed when the suits were commenced. *Troy v. Smith*, 33 Ala. 469; *Marshall v. Croom*, 60 Ala. 121; *Means v. Hicks*, 65 Ala. 241. And that accords with the general principle that a judgment is, for or against strangers to it, evidence only of its own existence, and affects them only by the consequences that legally flow from that existence. 2 Black on Judgments, Sec. 604; *Schreiner v. High Court, etc.*, 35 Ill. App. 576; *Sisk v. Woodruff*, 15 Ill. 15.

Without looking into the transactions between the appellant and her husband, the decree must be reversed upon the ground that the appellees have not put themselves into position to attack them. They have not shown that he owed them when the land was conveyed to her.

The decree is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reversed and remanded.

CHARLES H. LANYON

V.

LANZ, OWEN & CO.

43	654
75	97

Judgments and Decrees—Practice—Judgment by Confession on Warrant of Attorney—When Defendant Allowed to Plead.

A judgment was entered by confession in pursuance of a warrant of

Lanyon v. Lanz, Owen & Co.

attorney, and defendant promptly filed a motion to set aside the same and to be allowed to plead, filing an affidavit, which was uncontradicted, setting out that part of the judgment was entered for a larger amount than was due; this court holds that the court should, under the circumstances, have allowed the defendant to plead to the disputed portion of the judgment.

[Opinion filed February 9, 1892.]

APPEAL from the Circuit Court of Cook County; the Hon. S. P. McCONNELL, Judge, presiding.

MESSRS. THORNTON & CHANCELLOR, for appellant.

MR. A. BINSWANGER, for appellees.

MORAN, J. A judgment was entered in favor of appellees and against appellant, by confession, in pursuance of a warrant of attorney, for the sum of \$739.44. The said judgment was entered on May 22d. On May 25th appellant made a motion to set aside the judgment and to be allowed to plead. In support of said motion he filed a sworn petition in which he states facts that, taken to be truly stated, show that he was not at the date of the entry of said judgment indebted to said appellees upon the note in a larger sum than \$499.46. This affidavit was wholly uncontradicted. The court refused to set aside the judgment as to any amount or to let appellant plead to the portion of the claim which he disputes. From the denial of said motion the appeal is prosecuted.

Appellant's uncontradicted affidavit showed that the judgment entered against him was in part unjust; that it was against right and equity that he should be compelled to pay the whole amount thereof. If such a showing was made with reference to the whole judgment, the court would be bound to set aside the judgment, or at least let the appellant in to plead, letting the judgment stand as security. The court exercises an equitable power in dealing with motions to set aside judgments by confession, and has the right to make such order as will protect the interests of the respective parties. The court should have allowed the judgment in this case to

stand and ordered an execution to go upon it for the amount that appellant admitted in his affidavit to be due thereon, and have allowed appellant to plead as to the portion of said judgment that he claimed was discharged, and was not owing by him to appellees, and an issue as to whether said disputed portion was in fact owing by him could be submitted to a jury. The court erred in denying the motion to let appellant in to plead to the disputed portion of the judgment note. For such error the order denying appellant the right to plead to such portion of the judgment must be reversed and the case remanded, with directions to the court to allow defendant to file his plea to all but \$499.46 of said judgment, and to stay execution for any greater amount than said sum upon said judgment till the issue formed on defendants' plea shall have been determined in accordance with the practice of the court in such cases.

Reversed and remanded.

FRANK WELLS

V.

FRANCIS J. PARROTT.

Attachment—Non-residence—What Necessary to Prove—Commission on Loan—Contract Price—Amount of Recovery.

1. In an action commenced by attachment the burden is on the plaintiff to prove that the defendant is a non-resident, and where the evidence is hazy and uncertain, this court will not reverse the decision of the lower court dissolving the attachment.

2. In the case presented, defendant had agreed to pay plaintiff a certain fixed sum for securing him a loan, and plaintiff complied with his part of the contract; this court holds that the court below erred in reducing the amount of plaintiff's compensation below that fixed by contract.

[Opinion filed February 9, 1892.]

APPEAL from the Circuit Court of Cook County; the Hon. JULIUS S. GRINNELL, Judge, presiding.

43	656
89	121
82	122

43	656
87	285

Mr. CHARLES B. MCCOY, for appellant.

Messrs. LOUIS KISTLER & SON, for appellee.

MORAN, J. This was an action commenced by attachment on the ground that defendant was a non-resident of this State. The defendant filed a plea denying that he was a non-resident of this State and also a plea to the merits. On the trial the court found in favor of the defendant on the attachment issue, and in favor of plaintiff on the merits, allowing a judgment, however, for only about half what plaintiff claimed was due him. Plaintiff excepted to the finding on both issues and the case is brought here for review.

As to the question of non-residence, the evidence shows that the defendant, who became of age in June, 1888, and was unmarried, and had always lived with his parents in Chicago, left an employment in which he had been engaged in Chicago for many years, and, on October 9, 1888, went to Eau Claire, Wisconsin, in the employ of an insurance company. That when he first went he only expected to stay a couple of weeks and took only a hand sachel and a change of linen, leaving his trunk and other clothing at his father's home. His stay in Eau Claire was prolonged from time to time, and he returned every three or four weeks and spent Sunday with his parents and brought his soiled clothing back sometimes and took other with him on his return to Eau Claire. He finally left there and returned to Chicago in September, 1889, something over three months after the attachment was commenced. August 22, 1889, at Eau Claire, he wrote a letter to one Brown at Chicago, offering to take employment at Eau Claire as representative of an insurance company, and saying, "I have resided here for the past year," etc.

Plaintiff might have shown by cross-examination what the exact terms of defendant's employment at Eau Claire were, but neglected to do so. The evidence is left on indefinite statements of the defendant as to his expectations and intentions. Residence consists of action and intention, and intention or expectation may be proved by the party's own statement;

that is, his statement as to what his intention was when he left and while he remained away, is competent, though it may be overcome by acts evincing a different intention. Absence from the State and having a fixed abode in another place, with the intention to remain permanently, at least for a time, for business or other purposes, will constitute non-residence even if there be an intention to return at the expiration of the time of residence in the foreign State.

Casual or transitory absence from the State will not constitute non-residence within the meaning of the attachment law. The absence must be so protracted as to amount to a prevention of legal remedy by ordinary process, and in determining whether one has ceased to be a resident it is important to know whether the purpose of the absence was such as to admit or require the acquisition of residence elsewhere. *Lawson v. Adlard*, 48 N. W. R. 1019. A mere departure of one, though an unmarried man, from the State on an engagement which is not expected to last more than two weeks, when the intention is to return at its termination, would not make one a non-resident, nor would the prolongation of the absence thus commenced by a series of engagements temporary in character and accompanied with the same intention have that effect. The burden was on plaintiff to sustain the allegation of his affidavit that defendant was a non-resident, and he has left the matter in too hazy and uncertain a condition for us to reverse the finding of the trial court upon that issue.

The finding on the merits we are compelled to reverse. Defendant made a written contract with plaintiff in and by which he agreed to pay to plaintiff for obtaining a loan of \$16,000, five per cent on that amount, and to pay for the examination of title, and all other expenses of making the loan. If plaintiff was entitled to recover at all under the contract for a loan, he was entitled to recover \$800 as the commissions, and \$25, which was shown to be the fee paid for examination of the abstract. The court must have found that plaintiff performed his part of the contract in order to find him entitled to recover anything under it. There is nothing in the record which authorized the court to reduce the compensation which plaintiff

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iff should receive to \$400. Plaintiff was not entitled to interest on the loan for the time it was detained, but was entitled, if entitled to anything at all, to \$825. For the error in refusing to allow him the commission fixed by the contract the judgment on the merits must be reversed and the case remanded, but the judgment on the attachment issue will stand affirmed.

Reversed and remanded.

43 659
157s 514

J. M. BRINKER ET AL.

V.

O. F. SCHEUNEMANN.

Sales—Lex Loci—New York Statute of Frauds—Alteration of Proposition, Whether Material.

1. Where a person residing in one State orders goods of a person residing in another State, who is there to deliver the goods to a carrier for the purchaser, the contract is made in the State of the vendor and its validity is to be determined by the law of that State.

2. Where an order as prepared by a vendor to be signed by vendee provided that vendee should, if required, give his paper at sixty days and the vendee, before signing, so changed the order that it provided that he should give his paper, if required, "at sixty or ninety days," the effect of the change was to give the vendee the option as to the time for which he should give his paper and was a material alteration in the proposed contract.

[Opinion filed February 9, 1892.]

APPEAL from the Superior Court of Cook County; the Hon. ELLIOTT ANTHONY, Judge, presiding.

Messrs. ULLMAN & HACKER, for appellants:

Mr. JOHN C. RICHBERG, for appellee.

MORAN, J. This was an action to recover for the failure

to deliver certain coal which it is claimed appellants agreed to deliver to appellee. From a judgment in favor of appellee this appeal is prosecuted.

Through two coal brokers as agents, one named Roberts, residing in Buffalo, N. Y., and one named Negley, residing in Chicago, certain negotiations were carried on for the purchase by appellee of about 1,000 tons of coal from appellants. It is unnecessary to detail the communications that passed between the brokers further than to say that they ascertained the prices at which appellants would sell the different kinds of coal, and about the quantities of the different kinds which appellee would want, and the general terms on which a contract for the sale of the coal from appellants to appellee could be made. On June 12, 1888, Negley, in his own name, addressed to Roberts an order to ship to appellee three cargoes of coal, stating price, quality, etc. This order was presented to Packard, appellants' manager in Buffalo, by Roberts, but he refused to ship the coal because neither Roberts nor Negley was financially responsible, and said that if appellants sold any coal to Scheunemann they would want the order to come direct from him and to be signed by him and exactly as they proposed it. Packard, acting for appellants, thereupon drew up an order and sent it to Roberts with the following letter:

"BUFFALO, June 13, 1888.

W. T. ROBERTS.

Dear Sir:—We inclose you herewith an order which you will please have Scheunemann & Company sign and return to us. You are to have from this price on the payment of the account ten cents per gross ton.

BRINKER & JONES."

The order inclosed was as follows:

"CHICAGO, June 13, 1888.

BRINKER & JONES,
Buffalo, N. Y.

Gentlemen:—Please enter our order and ship as soon as possible three cargoes anthracite coal, about three thousand tons, as follows: grate and egg, \$3.80; stove and chestnut,

Brinker v. Scheunemann.

\$4.05 per net ton, f. o. b. vessel, Buffalo. First cargo chestnut if you can, or grate and chestnut, or if you can not do that make it egg; if a mixed cargo, aft. In this order I shall require about 1,000 tons each size, grate, egg and nut. I do not want any stove in this order, unless you are unable to make up a cargo without that size. In that event you can put in say 500 tons stove. Terms of settlement, cash at end of sixty days from date of bill of lading. Dock weights to govern settlements.

If you require it we will give you our paper at sixty days from date of bill of lading. Coal to be of good quality and nicely prepared."

Roberts inclosed the order to Negley, telling him in the accompanying letter that appellants wanted appellee to sign it, and requesting Negley to have him do so without delay and to send it to him, Roberts, when signed, and he would deliver it to appellants. Instead of having the order signed as it was drawn by appellants' manager, it was changed so as to make the portion of it immediately following the sentence "Dock weights to govern settlements" read as follows: "If you require it we will give you our paper at sixty days or ninety days from date of bill of lading, we paying the interest on time exceeding the sixty days. Coal to be of good quality and nicely prepared. We would prefer you to make the order 1,000 grate and egg, 500 range and 1,500 chestnut."

Thus altered, the order was signed by appellee and was forwarded to Roberts, who delivered it to appellants' manager in Buffalo about June 15th.

There is a conflict of evidence as to whether, when Roberts handed the said order to Packard, the latter said that appellants would fill it, but in the view we take of the case this dispute is not as to a material matter.

It is not pretended that appellants or their manager ever accepted the order in writing, and on June 22, 1888, they forwarded to appellee the following letter:

"O. SCHEUNEMANN & Co., Chicago Ill.

Gentlemen:—Some few days ago we were handed an order from you for some vessel coal. We should be glad to furnish this lot of coal, and are sorry that it is impossible for us to

do so. Our vessel brokers here refuse to give us boats to go to your dock. The tonnage and terms are not as talked here.

We trust that when you are again in the market you will give us an opportunity of quoting you, and remain,

Yours very truly,

BRINKER & JONES. P."

Appellee insisted in a letter to appellants written on July 7th, that he had purchased three cargoes of coal from them, and notified them that he would go on the market and buy the coal and hold them for the loss, as coal had advanced; and appellants replied, on July 12th, that they had sold appellee no coal, and that they would entertain no claim for loss he might sustain.

The appellants pleaded the New York statute of frauds. The part of said statute material here declares that "every contract for the sale of any goods, chattels or things in action for the price of \$50 or more shall be void, unless a note or memorandum of such contract be made in writing, and be subscribed by the parties to be charged thereby." It is contended by appellants, that the order received by them from appellee was a new proposition; that it could not become a contract till it was properly assented to by them, and as that assent was to be given in Buffalo and the contract was to be performed there, it would be a New York contract governed by the statute of frauds of that State, and as there was no assent to or acceptance of the order in writing by the party sought to be charged upon it, it never became binding as a contract.

The rule is that the contract is to be interpreted and defined by the law of the place where it is made, and where, in the absence of anything to indicate the contrary, it is presumed that it is to be performed. "If a person residing in one State orders goods of one residing in another State, who there delivers the goods ordered to a carrier for the purchaser, the contract is made there, and its validity depends upon the law of the State of the seller's residence." 3 Am. and Eng. Ency. of Law, 857, note 3, and cases there cited. Therefore, if the order signed by the appellee and forwarded by him to appellants is to be treated as appellee's proposition to them, it

never became binding on them for the reason that their acceptance of its terms or agreement to fill it was not evidenced as required by the statute of New York. It is contended by appellee that the order is to be treated as appellants' proposal to him, and that he accepted and signed it as they sent it, or without material change. It is said that the changes made in the latter part of the order was no change of the contract; that it only gave to appellants another option as to terms of payment and did not relieve appellee from the contract as prepared, in any way, or vary its terms. It may be true that if the effect of the changes in the order was only to give appellants an option as to whether they would take appellee's paper at sixty days or ninety days, the change would not be material; but that is not the effect of the alteration. Instead of his promise to give his paper at sixty days if appellants should require it, he makes a promise to give his paper at sixty or at ninety days. The option is secured to him and not to appellants. Where a contract is in the alternative, as that the promisor shall pay in money or in goods, "or shall pay a sum of money or deliver a horse to the promisee," the right to select the mode of performance is impliedly vested in the promisor. 2 Chitty on Con., 1061; Bishop on Con., Sec. 785. Without considering whether the other changes made in the order were material or not, it is manifest that this one was of such a character as rendered the order signed by appellee different in a substantial particular from the one sent to him by appellant to be signed. The act of appellee in so changing the order sent to him by appellants amounted to a rejection of their offer and a substitution of his own proposition in its place. They were thus released from the acceptance implied from thus having prepared the order and having sent it to him to be signed, and as we have seen that they never assented to appellee's proposition in such manner as to make it valid or binding upon them, the result was that no contract was formed between the parties, and consequently there is no basis for this action. Maclay v. Harvey, 90 Ill. 525; Fox v. Turner, 1 Ill. App. 153; Smith v. Wetherell, 4 Ill. App. 655.

The contention of appellee that a contract was made and

signed by Roberts for the sale of the coal is without support in the evidence. An agreement as to certain terms of a contract was arrived at between Roberts and Negley, but Roberts' letter of June 11, 1888, clearly shows that no contract was then formed between appellants and appellee. Therein he directs Negley: "Be sure and have Otto (Scheunemann) write out this order to Brinker, Jones & Co., and have him state that dock weights govern. Make it so binding that he can't crawl out of it."

The verdict of the jury is clearly against the law and the evidence, and the motion to set the same aside should have been granted.

The judgment will be reversed and the case remanded.

Reversed and remanded.

INDEX.

ACCOUNT—See EVIDENCE, 5.

ACTIONS—See EJECTMENT, 1; PRINCIPAL AND SURETY, 10, 13; MECHANICS' LIENS, 3.

1. Where an injury has been caused by an act in one county, to land situated in another county, the venue may be laid in either. *O. & M. Ry. Co. v. Combs*, 119

2. The commencement of a suit in the Circuit Court will not bar or preclude the defendant therein from bringing a suit in a justice court against the party bringing the same. *Tompkins v. Gerry*, 255

3. It can not be presumed that by permitting an action of assumpsit to be brought upon a sealed instrument, the legislature intended to make joint contractors of those who separately, part by deed and part by parol, had engaged for the same thing. *Fischer v. Spang*, 378

4. A party's rights must be governed by the law in force when his cause of action accrued. *Berkowsky v. Sable*, 410

5. Parties have no vested right in a remedy provided by law, and the legislature may properly change the mode of enforcing rights, and the new law will govern as to proceedings instituted after it goes into effect, no matter when the rights sought to be enforced accrued. But the law in force at the time that rights accrue is the law that measures and limits such rights. *Hughes v. Russell*, 430

6. For the mere telling of a lie an action can not be maintained. *Ransford v. Willets*, 436

7. There is no precedent for an action, not of debt, covenant or assumpsit, to recover money due by contract, but of trespass on the case for using the money with which the debt ought to have been paid for other purposes. *Id.*, 436

ADMINISTRATION—See GUARDIAN AND WARD; PARENT AND CHILD.

1. As a matter of practice each item in an administrator's account rendered, is a separate claim depending alone upon its own merits, and as to each item judgments are separate, and the same principle would apply to a guardian's report. *Rawson v. Corbett*, 127

2. In a controversy involving a claim by a child against his father's estate for services rendered for the father at his request, the fact that the mother of such claimant is administratrix of her husband's estate, will not prevent her from testifying in his behalf, nor will the relation to the estate of such administratrix by way of her interest under the statute regarding descents, prevent her being called as a witness in such case. *Robnett v. Robnett*, 191

3. A mother may, in such case, testify that at her deceased husband's

ADMINISTRATION. *Continued.*

request she wrote a letter to a child of age and earning his living at a distance, asking him to return home and remain. She acts in such case as agent of her husband in view of Sec. 5, Chap. 51, R. S., but she will not be allowed to testify as to labor performed, money advanced and the like. *Id.*, 191

4. Where in such case such child returns and takes part in the labor incident to home life, although there is no express agreement for compensation, an intention to compensate will be implied. *Id.*, 191

5. Although the claimant in such case is not competent as a witness in chief, he is competent to testify in rebuttal to conversations and transactions testified to by other witnesses called by the opposite party. *Id.*, 191

6. While a claimant who does not file his claim in the County Court on the day of adjustment may be liable for costs, this does not follow upon appeal from judgment for the claimant to the Circuit Court as to the costs therein. *Id.*, 191

7. Upon the presentation of a claim against an estate covering moneys alleged to have been due complainant from deceased, his financial agent, it is enough to prove that funds of the former came into the hands of the latter; the estate must show what became of them. The complainant is not required to show, by a preponderance of the evidence, that neither he nor any other person had received from such agent or another the amount for which claim is made. *Grant v. Odiorne*, 402

AFFIDAVITS—See PRACTICE, 9; JUDGMENTS AND DECREES, 15; NEW TRIAL, 3.

1. Affidavits should set forth facts. It is for the court to draw conclusions from the facts proved. *Carpenter v. White*, 448

AGENCY—See ADMINISTRATION; MUNICIPAL CORPORATIONS, 5; TRESPASS, 5.

1. An agent employed to settle a debt can not purchase it for himself. One who agrees to act for another is not allowed to deal in the business of his agency for his own benefit, or to do an act having a tendency to interfere with the proper discharge of his duties. *Whitesides v. Cook*, 183

2. In an action by a broker to recover commissions upon a sale of real estate, this court holds, there can be no recovery, the plaintiff's efforts to procure terms which the defendant would accept having failed, the trade finally made having been brought about by other influences after the plaintiff had abandoned the business. *Carlson v. Nathan*, 364

3. Where certain funds are in the hands of an agent under an express trust, he holding them, not as a collecting but as an investing agent, the statute of limitations will not begin to run as to them until demand is made therefor, or he places himself in a position of hostility to his principal. *Grant v. Odiorne*, 402

4. In the case presented, this court holds that the evidence tended

AGENCY. *Continued.*

to show a fraudulent concealment, and the fact being that the fraud was not discovered until after the death of the agent, that the statute began to run only from its discovery. *Id.*, 402

5. The statute does not run where funds are intrusted to another to invest, and the evidence does not show that he ever refused to act as an investing agent, nor any demand upon him to pay over anything more than the interest he had collected. *Id.*, 402

6. In an action brought by real estate brokers to recover a sum alleged to be due as commission, this court declines, in view of the evidence, to interfere with the judgment for the plaintiff. *Granger v. Griffin*, 421

7. In an action brought to recover a sum alleged to be due as a commission on a sale of real estate, this court declines, in view of the evidence, to interfere with the judgment for the plaintiff. *Crow v. Wolff*, 458

8. The action being upon a special contract, a contention that there can be no recovery under the common counts because the agent did not do all that he was bound to do thereunder—not only find a purchaser, but prepare the papers for conveyance, etc., the owner having sold the property—and that the principal, not having availed himself of the offer, obtained no benefit from what the agent did, is unavailing where there is no evidence that it was the understanding that the agent should prepare the papers for conveyance, etc., or that it was the custom for the agent who makes the sale to do so. *Id.*, 458

9. In an action based upon a contract entered into by an alleged agent of defendant, it is held that the jury were properly instructed to find for the defendant, no evidence having been introduced tending to establish the alleged agency. *Milburn Wagon Co. v. Sterens*, 508

10. A principal is bound to indemnify his agent against the consequences of all lawful acts done by him *bona fide* in pursuance of the authority conferred. *First National Bank v. Tenney*, 544

11. When an agent is sued for an act done in pursuance of his employment, he is not bound to let judgment go against him, but may defend and recover from his principal the expenses of a defense *bona fide* made; he may also prosecute an appeal from an adverse judgment. *Id.*, 544

ALTERATION—See CONTRACTS, 11, 12, 13, 14, 24.

APPEAL AND ERROR—See AGENCY, 11; CRIMINAL LAW, 6; EVIDENCE, 2, 3; GUARDIAN AND WARD, 1; JUDGMENTS AND DECREES, 15; JUSTICES, 3; RAILROADS, 2, 39.

1. The fact that a *remittitur* has been entered in a given case, in this court, for a part of the sum for which a certain judgment was rendered below, can not cure errors of law occurring on the trial going to the right of recovery. *Ramming v. Caldwell*, 175

2. Upon a second appeal an appellate court will not consider questions passed upon and determined on a former appeal. *Whitesides v. Cook*, 183

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3. No appeal lies from an order in vacation, denying a motion to dissolve an injunction. *School Directors v. Wright*, 270

APPEAL AND ERROR. *Continued.*

4. Where a declaration charges two persons to be jointly liable under a contract, the trial demonstrating the contrary, it is error to render judgment against one of them. *Cooper v. McNeil & Higgins Co.*, 350

5. Error without injury is no ground for reversal. *City of Chicago v. Edson*, 417

6. Where no objection is made to evidence when offered, an objection touching the same can not be considered upon appeal. *Id.*, 417

7. Where no cause of action is stated in a given declaration, nor proof of the grievance alleged in it, this court will not inquire whether the proceedings on the trial were regular or not. *Blumenfeldt v. Korschuck*, 434

8. The question whether it was error to refuse to instruct the jury in a given case to disregard the remark of an attorney in the case, made in his opening, upon the oral request of opposing counsel, will not be considered by this court. A written instruction to such effect should be asked. *Harding v. Sandy*, 442

9. This court deprecates the practice of assigning an excessive number of errors, and the making of briefs of undue length. *Id.*, 442

10. If upon appeal from the judgment of a justice it appears that the certificate to the transcript is defective, a rule on the justice to supply a proper certificate may be obtained. It is not proper to strike out the transcript on file, though the same be imperfect, it being sufficient to give the court jurisdiction of the subject-matter. *McNichols v. Hunt*, 451

11. There is no legal connection or repugnance between the denial of a continuance at one term, and a call for trial in the first week of the succeeding term. *Id.*, 451

12. The decision of the Supreme Court, in *Kirchoff v. Union M. L. Ins. Co.*, 128 Ill. 199, 133 Ill. 368, holding that an appeal in the case presented properly lies to this court, followed. *Story v. Springer*, 495

13. When a jury trial is, under the statute, waived, and the case tried by the court, this court may, on review, do what, in its judgment, the lower court ought to have done, and enter judgment accordingly. *Union National Bank of Chicago v. Manistee Lumber Co.*, 525

14. The correct practice requires the facts in such case to be recited on the record here only when a judgment, based upon the facts, is reversed without remanding, or with final judgment on the cause of action; but when this court reverses that of the lower court for error in law, and refrains from remanding, the reason why it refrains from an act discretionary need not appear. *Id.*, 525

15. A motion for a new trial, and exceptions to the action of the court thereon, must be made a part of the record by a bill of exceptions, or this court can not take notice thereof. *Dignan v. Gilbert*, 536

16. A recital by the clerk, upon the record, is no part thereof. *Id.*, 536

17. Appellant can not complain here of an error committed by the lower court in his own favor. *Spinney v. Barbe*, 585

18. In the case presented, an order of the Circuit Court is affirmed

APPEAL AND ERROR. *Continued.*

in order that the question involved may be speedily presented to the Supreme Court for final determination. *Fairbanks v. Farwell*, 552

19. Although there were several disputed items included in a verdict, the fact that the trial court did not, in ordering a *remittitur*, specify to which item it applied, does not constitute an error for which this court will, upon the case presented, reverse the judgment. *Ingalls v. Allen*, 624

20. An action being brought to recover damages for a broken arm received by plaintiff when attempting to board defendants' car, this court holds that, in the absence of evidence as to amount of expenses incurred by plaintiff, it was error to tell the jury that, in assessing damages, they might consider the necessary expenses resulting from the injury. *No. Chicago St. Ry. Co. v. Cook*, 634

ASSIGNMENTS—See INSOLVENCY. 13, 15.

1. Ordinary diligence on the part of the assignee of an insolvent, requires that he should avail himself of sources of knowledge, easily open to him, to learn upon what account money is paid to or required of him in his character of assignee. *Doran v. Hodson*, 411

2. If an assignee obtains *ex parte* orders of a County Court upon an assumed state of facts, which he knows, or ought to know does not exist, he should not be protected by them against just claims. *Id.*, 411

3. It is within the jurisdiction of the County Court to hold the assignee to account for everything that comes to his hands by virtue of his position, and direct the disposition thereof, and require him to surrender to the rightful owner what in his hands are not assets of the estate, and having such jurisdiction, the rightful owner can not go to any other court for a remedy. *Id.*, 411

4. Upon a petition to a County Court for an order on the assignee of an insolvent, to pay over the proceeds of certain goods sold by said insolvent previous to his assignment, this court holds that such proceeds were not assets of the estate, and that the court erred in not making the order prayed for. *Id.*, 411

5. All the original jurisdiction that belongs in ordinary cases to all courts, belongs to and may be exercised by the County Courts in administering the assets in the possession of an assignee of an insolvent. *T. S. M. E. Church v. Wetherell*, 414

6. This court holds that the assignee defendant should not be ordered to account for the credits, upon which in part certain goods were sold, it not being shown that he received such credits, or anything on account thereof. *Chapin & Gould v. Wabash Mfg. Co.*, 446

ATTACHMENT.

1. In an action commenced by attachment the burden is on the plaintiff to prove that the defendant is a non-resident, and where the evidence is hazy and uncertain, this court will not reverse the decision of the lower court dissolving the attachment. *Wells v. Porrott*, 656

ATTORNEY AND CLIENT—See GUARDIAN AND WARD, 3; MASTER AND SERVANT, 8.

ATTORNEY AND CLIENT. *Continued.*

1. Attorneys who have entered into a contract to institute legal proceedings to test the validity of municipal bonds (the contract providing for certain fees in case they were held to be invalid) can not be required to depart from their own view of the law as to the manner of making such test, or to appear and defend every suit that may be brought thereon against a given county, unless it is necessary to do so to avoid liability on the part of the county being enforced against it; and the fact that they were notified in a given case of the institution of a suit in a court named, and that they declined to appear and defend the same, will be no defense to their right of recovery upon said contract, if the result of the litigation as instituted and carried on by them was, that the bonds were held invalid, or that taxes could not be collected to pay the same. *Co. of Franklin v. Layman*, 163

2. In the absence of such contract with the county board, a contract with an individual by which the same result would ensue would create no liability against the county. *Id.*, 163

3. The right to levy a tax, and to make an assessment to pay it, for the purpose of raising money to pay the interest on such bonds, being determinable by an exception to the application of the collector for judgment against delinquent lands, the fact that that method was selected by such attorneys and prosecuted in the name of an individual tax payer was within the contract in the case presented, and such proceeding resulting in a judgment that would defeat the collection of the bonds would warrant a recovery of the fees agreed upon. *Id.*, 163

BANKS—See INSOLVENCY, 9; INSTRUCTIONS, 17; NEGOTIABLE INSTRUMENTS, 11.

1. The title of money in all general deposits passes to the bank in which they are placed. *Telford v. Patton*, 151

2. Where money is deposited in a bank and its certificate of deposit is received by the depositor, it providing for payment of the same within a time named to another, such other is entitled thereto at the expiration thereof, although the certificate remains in the hands of the depositor. *Id.*, 151

3. Acceptance of the gift by the person in whose name the certificate was made out, will be assumed, although the depositor dies with the same in his possession, it having never been delivered. *Id.*, 151

4. A special deposit is a deposit to be returned in the identical thing; the very bills or coins are to be returned. *M. A. Assn. of N. W. v. Jacobs & Shaw*, 340

5. A general deposit is one which is to be returned in kind, not the same bills or coins, but the same amount of money. *Id.*, 340

6. Where money is received in a bank as a special deposit for safe keeping, with the understanding that it shall be cared for and the identical money returned, the bank has no right to use the money in its business; but where the money is deposited with the understanding that a like sum shall be repaid, the transaction is in the nature of a loan, the relation of debtor and creditor being created, and no trust can be predicated on such a deposit. *Id.*, 340

BANKS. Continued.

7. A deposit must be considered to be a general deposit where the money in question has been mixed with the funds of a bank by the acquiescence, or with the consent of the depositor. *Id.*, 340

8. In the case presented, this court holds, in view of the evidence, that the deposit in question was general, not special. *Id.*, 340

BILLS OF EXCEPTIONS—See PRACTICE, 3.

1. The rule that bills of exceptions settled and signed by the judge who tried the cause, although after the expiration of his term of office should be recognized as regular and valid, does not obtain in this State. *People v. Altgeld*, 460

BUILDING AND LOAN ASSOCIATIONS.

1. A by-law of a building and loan association, providing that no share shall be transferred while any debt, penalty, or due of any kind against the owner thereof may remain unpaid, creates a lien upon the shares as against the shareholder, for a debt due by him to the association, and the assignee of an insolvent shareholder stands in the shareholder's shoes. *Thirty-first Street Bldg. Assn. v. Wetherell*, 509

2. It therefore follows that, where a shareholder in a building and loan association was a banker, having funds of the association on deposit, that the assignee can not collect from the association the withdrawal value of the shares, leaving the association to share with the other creditors in a dividend for the amount of its deposit, but the association can off-set against the assignee the amount due it as a depositor, against the withdrawal value of the shares. *Id.*, 509

CARRIERS.

1. The law requires that carriers of passengers shall exercise the highest degree of practicable care and diligence consistent with the mode of transportation used, in protecting the latter from injury. *M. & O. Ry. Co. v. Klein*, 63

2. In case of loss by a carrier of personal wearing apparel, the owner is entitled to recover the value of such things to him, not what the same would have sold for in the market. *Parmelee v. Raymond*, 609

3. Express companies are insurers for the safe delivery of packages intrusted to their care, and nothing can excuse them from this obligation except the act of God or of the public enemy. No circumstance of fraud, imposition or mistake will excuse the delivery, by a common carrier, of a package to the wrong person. *Shearer v. Pacific Ex. Co.*, 641

CHAMPERTY.

1. A champertous contract is one that gives to an attorney or a third person a portion of the property sued for. *Neal v. County of Franklin*, 267

COMMISSION MERCHANTS.

1. A consignor may always direct as to the disposition of the net proceeds of a consignment. *McCausland v. Wheeler Savings Bank*, 381

2. If a consignee takes a consignment with knowledge that a draf

COMMISSION MERCHANTS. *Continued.*

has been drawn against it, he can not retain the consignment or its proceeds, and repudiate the draft. *Id.*, 381

3. If commission merchants are notified by a shipper that a draft in favor of a third person is to be paid out of the proceeds of goods shipped, such notification in connection with the draft amounts to an appropriation of the proceeds to the payment of such draft. *Id.*, 381

CONTINUANCE—See PRACTICE, 2, 9.

CONTRACTS—See ATTORNEY AND CLIENT, 1, 2, 3; CHAMPERTY, 1; CORPORATIONS, 1, 2, 3; INTEREST: REAL PROPERTY, 4, 6; SPECIFIC PERFORMANCE, 1, 2.

1. A court of law can not reform the contract in question, although the evidence introduced would justify a court of equity in so doing. *A. C. Ins. Co. v. Simpson*, 98

2. Whether or not an alleged contract was entered into, is, in a given case, a question of fact for the jury. *Co. of Franklin v. Layman*, 163

3. There can be no implied contract between parties named touching a given matter, there being a complete, written express contract embracing the same. *Ramming v. Caldwell*, 175

4. A written contract containing no warranty, the law will imply there was none, and that a given purchase was made at the risk of the purchaser and upon his own judgment. *Id.*, 175

5. It is proper, in case of a written contract, for the court to construe the same and instruct the jury if such be the case that it contains no warranty. *Id.*, 175

6. An express contract in writing can not exist as to one part of a contract, and an implied one of the vendor as to another part of the same contract, growing out of the same transaction, and the same in point of time. *Id.*, 175

7. A promise to pay the debt of a retail dealer to a wholesale merchant as a part of the consideration of a sale of the stock of such retail dealer to the promisor, is founded on a legal consideration. *Scudder v. Carter*, 252

8. Such promisor can not defeat recovery of the debt he promised to pay, because of any secret agreement he may have had with the original debtor. *Id.*, 252

9. A board of supervisors of a county is a corporate body and can only act as such. It represents the interests of the county as to those matters wherein power is conferred by statute. The duties imposed by law are of such a nature, and the corporate body is of such a character as to make it a deliberative assembly. It has those rights which inhere in any such body, of which any one dealing with it must take notice. If for want of due deliberation ill advised action is taken, the interests of the public require that it should be permitted, at least at the same meeting, to reconsider and annul such action. *Neal v. County of Franklin*, 267

CONTRACTS. *Continued.*

10. Changes may be made in sealed instruments after their execution by consent of the parties thereto, though made after delivery, and such consent may be proved by parol. *Kneedler v. Anderson*, 317

11. The doctrine that a contract under seal can not be changed by a parol agreement, does not apply to an actual change in the instrument itself by the direction or consent of the parties thereto. In such case there is no parol agreement existing, independent of the contract. *Id.*, 317

12. This doctrine applies where the parol agreement exists independent of the contract under seal and where such contract is left intact in form. *Id.*, 317

13. A scrivener employed to put in writing a contract for the sale of land, may make changes therein at the instance of the parties thereto; authorization in writing is not necessary. *Id.*, 317

14. A contract for the sale of land does not have to be under seal, neither does the agent's authority to make such contract; but to be valid, it must be in writing. *Id.*, 317

15. The rule that where there is an inconsistency, the written portions of a contract will prevail over the printed, has no application where there is no inconsistency, and does not do away with the rule that effect is, if possible, to be given to every portion of the contract. *Peck v. Scoville Mfg. Co.*, 360

16. No joint liability exists upon separate individual contracts although for the same matter. *Fischer v. Spang*, 378

17. Where parties, wholly upon the assurance of an architect that they will be paid, he having no authority to accept bids or make contracts, do work, not at the request of the owner of a building in process of construction, and which they had no reason to suppose he would regard as an extra, no request by him will be implied. *McKey v. Nelson*, 456

18. A man may always bind himself by a promise to pay an honest debt, whatever bar, such as bankruptcy, statute of limitation or the requirement of performance of conditions precedent, may, in fact or law, exist to bar an action on the original contract under which the indebtedness was incurred. *Morse v. Crate*, 513

19. One party to a contract loses no rights by failing to make a tender contemplated by the contract, where the other party was not ready to perform on his part. *Union National Bank of Chicago v. Manistee Lumber Co.*, 525

20. Upon the case presented, this court holds that the defendant was justified in treating the contract upon which the action was brought, as terminated by the act of plaintiff's representative. *Bigelow v. Chapman*, 561

21. Appellee contracted with appellant to deposit in his favor a certain sum with a firm named; this court holds that the firm in question having charged appellee and credited appellant with the stated sum upon its books, that the contract had been complied with by appellee. *Rigdon v. Conley*, 593

CONTRACTS. *Continued.*

22. In the case presented, defendant had agreed to pay plaintiff a certain fixed sum for securing him a loan, and plaintiff complied with his part of the contract; this court holds that the court below erred in reducing the amount of plaintiff's compensation below that fixed by contract. *Wells v. Parrott*, 656

23. Where a person residing in one State orders goods of a person residing in another State, who is there to deliver the goods to a carrier for the purchaser, the contract is made in the State of the vendor and its validity is to be determined by the law of that State. *Brinker v. Scheunemann*, 659

24. Where an order as prepared by a vendor to be signed by vendee provided that vendee should, if required, give his paper at sixty days, and the vendee, before signing, so changed the order that it provided that he should give his paper, if required, "at sixty or ninety days," the effect of the change was to give the vendee the option as to the time for which he should give his paper and was a material alteration in the proposed contract. *Id.*, 659

CORPORATIONS—See INSOLVENCY, 10, 11, 12.

1. Contracts between the controlling majority of stockholders of a corporation, in its behalf with themselves, are not sanctioned by courts of equity. Such contracts courts of equity treat as of no avail; the parties acting thereunder become entitled to receive, not the sum stipulated, but merely a fair compensation for what they have done. *Rigdon v. Walcott*, 352

2. The right of one stockholder that all the agents of the corporation shall act not in their own interest, or in the interest merely of those stockholders by whose favor they hold their places, but with an eye single to the interests of the corporation, is as great as that of all the stockholders. *Id.*, 352

3. In the case presented, this court holds, in view of the evidence, that complainant's contract with defendant was not one of which a court of equity would or could compel a specific performance, and declines to interfere with the decree for the defendant. *Id.*, 352

4. No judgment at law is necessary to determine that parties filing a bill to recover under Sec. 16, Chap. 32, R. S., are creditors. They may establish that they are creditors and the amount of the indebtedness, and reach the fund or liability created by said section, and distribute it among all those for whose benefit it is created, by an original bill in chancery. *Woolrerton v. Taylor Co.*, 425

5. In the case presented, this court holds that it was improper to refuse to grant leave to complainant to withdraw his replication to certain pleas, and to submit a motion to strike the same from the files for reasons stated therein; that the purely technical judgment on the issues made by the pleas as they stood, is the result of the court denying the motion, which should have been allowed, and that the judgment on the pleas can not stand, as it is a mere technical obstruction to reaching a just result in the case. *Id.*, 425

CORPORATIONS. *Continued.*

6. Where no plea of *null tiel* corporation has been filed, it is not necessary for a plaintiff corporation to make proof of its existence. *Calumet Paper Co. v. Knight & Leonard Co.*, 566

7. Upon a bill filed, seeking to take the management of a corporation out of the hands of its officers, to have a receiver appointed and an accounting with its creditors, its affairs wound up and its assets distributed among its stockholders, upon the ground that its affairs were not being managed in the interest of all its stockholders, but for the benefit of other corporations, with which a person owning a majority of the stock of the company in question was connected, this court holds, that to sustain such a bill, the allegations should have been specific and definite in the charge of fraudulent mismanagement, so that the court could see that the charges are not the mere conclusion of the pleader. *Wheeler v. Pullman Iron & Steel Co.*, 626

COSTS—See ADMINISTRATION, 6; PRINCIPAL AND SURETY, 9.

COURTS—See TRIAL BY JURY.

1. In this State the judicial powers of government are vested in courts, and persons not members thereof can not exercise judicial functions. *People v. Altgeld*, 460

2. As an individual, a judge has no power to make judgments or judicial records; these things he can only do when he is acting as a court. *Id.*, 460

3. An open court is a court formally opened and engaged in the transaction of judicial affairs to which all persons who conduct themselves in an orderly manner are admitted. *Suesemilch v. Suesemilch*, 573

CREDITOR.

1. The word "creditor" means a person to whom a debt is owing by another person; standing by itself it means creditor at large. *Woolverton v. Taylor Co.*, 424

CREDITORS' BILLS.

1. Upon a bill filed to subject certain real estate to the payment of a judgment obtained against a married man, the same having been conveyed by himself and wife to a third party, who in turn conveyed it to the wife, this court holds, in view of the evidence, it being claimed that the premises were a homestead, and bought with the wife's money, that the amount of money so invested by her should be ascertained, and that to such extent, in addition to \$1,000 for the homestead, if the premises should be sold, she is entitled to be paid, but without interest. *Harder v. Rohn*, 365

2. Should property in such case be sold, the homestead may be claimed under the statute at the sale. *Id.*, 365

3. This court holds that no *laches* is imputable to the plaintiff in suffering several years to elapse before attempting to assail the validity of the conveyance in question. *Id.*, 365

4. Upon a bill brought to subject property conveyed by a husband to his wife, to the debts of the husband, the creditors must show, either

CREDITORS' BILLS. *Continued.*

that they were creditors at the time of the conveyance, or that the conveyance was so made for the purpose of defrauding subsequent creditors. *Sweet v. Dean*, 650

5. Upon a bill by a judgment creditor to set aside an alleged fraudulent conveyance antedating the judgment, the judgment is not evidence that the debt existed when the suit was commenced. *Id.*, 650

CRIMINAL LAW.

1. Where a declaration sets forth that a defendant on divers days and times between days specified, assaulted the plaintiff, any number of assaults within that period may be proved. *Keith v. Knoche*, 161

2. Whether or not an assault by a man upon a woman is to be looked upon as having been made with a view to carnal intercourse, is a question to be determined by the jury from the evidence adduced. *Id.*, 161

3. The method provided for by Sec. 574 of the Criminal Code, for procuring a discharge from imprisonment, or for preventing the defendant, who may be convicted of a misdemeanor, punishable by fine only, from being imprisoned, is purely statutory and unknown to the common law. *Lambert v. People*, 223

4. The best form of practice to be adopted under that section is to determine the amount of fine and of costs, and enter appearance and confess judgment, so much fine and so much costs, together with costs to thereafter accrue. No particular form of judgment is necessary if the record contains sufficient to show the amount for which execution is to issue. *Id.*, 223

5. When a conviction is had and the judgment entered for fine and costs, it appearing in the same judgment and record that the defendant so convicted, being desirous of replevying the fee bill and fine with persons named, confessed a judgment in favor of the people, and the costs are taxed in a fee bill, the judgment will show the amount of fine, and the fee bill will show the amount of costs, and the costs in such case are determined by the fee bill; and where a defendant procures his discharge or prevents his imprisonment by reason of a confession of judgment for the amount of fine and costs by himself and his sureties, he is estopped from questioning the amount of the fine or costs. *Id.*, 223

6. No appeal or writ of error could be prosecuted from the judgment of conviction, for the reason that the judgment by confession would be a release or waiver of error, and the costs are as integral a part of that judgment of confession as would be the fine assessed on the judgment of conviction. *Id.*, 223

7. Where, in such case, an execution issues after the lapse of five months for the amount shown by the record for the fine, and the amount shown by the fee bill for the costs, the court may not, on a motion to retax fee bill, or a motion to quash the fee bill entered on the judgment of conviction, either retax costs or quash the fee bill, and even if entertained, such action can not affect the judgment. *Id.*, 223

CROPS.

1. When a crop planted is not up when destroyed, the value thereof must be estimated upon the basis of rental value and cost of seed and

CROPS. Continued.

labor; when the crop is more or less matured so that the product can be fairly determined, the value of the crop when destroyed constitutes the measure of damages. *O. & M. Ry. Co. v. Nuetzel*, 108

2. In the case presented, this court holds certain questions sought to be asked touching rental value and cost of labor in raising crops, proper as a matter of cross-examination, in order to test the fairness and determine the basis on which the witness fixed the value of the crop destroyed, but that the sustaining of the objections thereto was not such error as would warrant a reversal. *Id.*, 108

CROSS-BILLS—See MORTGAGES, 4.

1. A cross-bill is a bill filed by a defendant in a given suit against the plaintiff therein, or other defendants therein, or both, touching the matter in question in the original bill. *Vail v. Arkell*, 466

2. In the case presented, the original bill prayed for an injunction restraining persons named from interfering with certain premises. The defendants therein filed a cross-bill asking for an injunction restraining complainant and another from interfering with the taking possession thereof by them. A second cross-bill was filed by a third person, claiming a right to redeem the same; she was made a party to both bill and cross-bill, in neither of which was any allegation showing why she should be a party, neither showing any ground of relief against her, nor asking for any. This court holds that she could have successfully demurred to both. *Id.*, 466

DAMAGES—See CARRIERS, 2; CROPS, 2; JUDGMENTS AND DECREES, 11, 12, 13; MASTER AND SERVANT, 3, 15, 22; MUNICIPAL CORPORATIONS, 1; TRESPASS, 6; RAILROADS; SALES, 7; WATER-COURSES, 3.

1. In cases of collision of teams in a street the innocent party is entitled to recover from the wrong-doer what it is reasonably necessary for him to pay, and he does pay, in order to repair the damage done, and also a reasonable sum for the loss of the use of his carriage while he is necessarily deprived thereof. *Travis v. Pierson*, 579

2. What one has actually paid for repairs is, in the absence of anything to indicate bad faith, admissible in evidence to show what the reasonable cost of such repairs is. *Id.*, 579

DIVORCE—See SEPARATE MAINTENANCE.

1. It is not to be laid down as settled law that a wife must live with her mother-in-law, or upon refusing to do so, be divorced for desertion. *Albee v. Albee*, 370

2. An agreement by a woman before her marriage to live when married in the house of and with her mother-in-law is of no force; all such promises are merged and obliterated by the marriage contract. *Id.*, 370

3. In the case presented, this court holds, in view of the evidence, that complainant is not a *bona fide* resident of the State of Illinois. *Id.*, 370

4. The statute requiring residence, should have a strict construction. *Id.*, 370

DIVORCE. *Continued.*

5. In a proceeding for divorce, where the defendant fails to appear and the bill is taken as confessed, a divorce can not be had upon the testimony of only one witness, examined in open court, and the deposition of one other witness. *Suesemilch v. Suesemilch*, 573

DOWER—See GUARDIAN AND WARD, 4, 5.

DRAM SHOPS.

1. Intoxication will be considered the proximate cause of a person's death, although a new force or independent act is the immediate cause thereof, where such intoxication puts the person killed in the way of the operation of such force or act. *Meyer v. Butterbrodt*, 312

2. In the case presented, this court holds that the husband of plaintiff came to his death from drowning by reason of his intoxicated condition. *Id.*, 312

EJECTMENT.

1. The statutory provision abolishing, after a recovery in ejectment, the action for *mesne* profits, and substituting a suggestion in assumpsit, does not apply to an action against a party not a defendant in the ejectment suit. *Snow v. McCormick*, 537

ELECTIONS.

1. An election must be held at the time and place required by law. *Snowball v. People*, 241

2. Whether a person who claims the right to, and exercises the powers of a public office, has been lawfully elected, is a question in which the people have an interest, and they have the right to test the incumbent's title to the office by a proceeding in *quo warranto* and have him ousted if he has usurped the same, and Circuit Courts in this State have jurisdiction of such proceedings. *Id.*, 241

3. In a proceeding in *quo warranto* to try the title of a person named, to the office of member of the board of education of a school district in a certain county, composed of territory lying partly without and partly within a certain city, this court holds that the judgment of ouster was properly entered therein, (Chap. 46, R. S., 665, 1889.) not having been observed as to that portion of the district outside said city. *Id.*, 241

ESTOPPEL—See MORTGAGES, 3.

EVIDENCE—See PERSONAL INJURIES, 5; RAILROADS; WITNESSES.

1. Expert testimony is inadmissible in a controversy where the relation of certain facts and their probable result can be determined without special skill or study. *O. & M. Ry. Co. v. Nuetzel*, 108

2. In the case presented, this court holds, a witness for the plaintiff having been permitted, against the objections of defendant, to state his conclusions upon a material point, based upon what he had learned by investigation, that the admission thereof was improper. *Frezinski v. Newborg*, 506

3. It was not error in the case presented for the court to allow certain witnesses, who were shown to have had experience in dealing in

EVIDENCE. *Continued.*

second-hand furniture, to give an opinion as to the value of such goods without having seen them, upon the assumption that they had been truly described as to their general condition and appearance by other witnesses. The objection to such testimony goes to its weight and not to its competence. *Walker v. Bernstein*, 568

4. The question of whether the treatment of a horse in the hands of a given person was such as a careful, prudent man would exercise in the care of his own horse, is a question of fact for the jury in a given case. *Small v. Roberts*, 577

5. Undisputed evidence that an account had been presented to and left for a time with a defendant five years before trial, that thereafter such defendant had been repeatedly importuned for payment, that no objection had been made to any item in the account, and that defendant had, long before suit, gone out of business, held, in the case presented, to have been sufficient to sustain a claim of an account stated. *House v. Beak*, 615

6. Receipts for goods given in the regular course of business, no complaint having been made, for years, that they were incorrect or improperly given, are *prima facie* evidence of the truth of their contents, although it does not appear that the persons signing them had any knowledge of the contents of the packages receipted for, other than appeared from their markings. *Id.*, 615

EXEMPTIONS—See PRINCIPAL AND SURETY, 12.

EXPRESS COMPANIES—See CARRIERS, 3.

FEEES—See ATTORNEY AND CLIENT; WITNESSES, 5.

FELLOW-SERVANTS.

1. In the case presented, this court holds that a locomotive engineer and a laborer were not fellow-servants, in the sense that the master would not be liable for an injury to the latter, occurring through the negligence of the other. *P. D. & E. Ry. Co. v. Johns*, 83

FENCES—See RAILROADS, 7, 8, 18, 22, 23, 24, 30, 31, 37.

FIXTURES.

1. Articles personal in their nature retain the character of personalty by agreement of parties, although the same are attached to the realty in such a manner that without such agreement they would lose that character, provided they are so attached that they may be removed without material injury to the article itself or the freehold. *Ellison v. Salem Coal & Mining Co.*, 120

2. Where chattels are sold to the owner of the soil on an agreement that their character as personal property is not to be changed, and he takes a chattel mortgage thereon to secure the purchase money, a prior mortgagee of the land can not claim them, although subsequently annexed to the freehold. *Id.*, 120

3. Upon the case presented, this court holds that the mirror, for removing which damages were sought, was a part of the realty. *Spinney v. Barbe*, 585

FORMER ADJUDICATION.

1. In an action of trespass *quare clausum fregit*, this court holds that the question raised therein is *res adjudicata* and affirms the judgment for the defendant. *Monteith v. Gehrig*, 465

FRAUD—See AGENCY, 4; CORPORATIONS, 7; INSOLVENCY, 3, 5, 6, 7, 13, 14; REPLEVIN, 2.

1. Where persons named alleged that they had been induced to purchase stock of another by his fraudulent representations, he can not be heard to say that the duty rested on them to suspect his veracity and that therefore their delay in finding out the fraud excuses it. *Tolman v. Smith*, 562

2. If the president of a bank, occupying a *quasi* fiduciary relation to his general customers, by deceit induces one of them to buy from him shares of stock at double their value, and retains them himself as security for a portion of the price unpaid, that customer may, by an action on the case, if not for money had and received, have the portion paid refunded. *Id.*, 562

FRAUDULENT SALES—See CREDITOR'S BILLS; INSOLVENCY.

1. As against creditors, sales of personal property by verbal contract may be deemed fraudulent and voidable, first, when the contract was entered into with fraudulent intent; second, when by the rules of law a fraudulent intent is presumed from the nature and character of the transaction. Of this latter class are sales made when there is no change, actual or constructive, of the possession of the property. *Hewett v. Griswold*, 43

2. If after a sale the property remains in the possession and control of the vendor as before the sale, the law conclusively presumes that the transaction is fraudulent as to creditors. *Id.*, 43

3. There is no difference in effect between a sale made with actual intent to defraud creditors, and one fraudulent in law. Notice of either is only notice of a fraudulent transaction not binding upon a creditor. *Id.*, 43

4. In the case presented, this court holds, in view of the evidence, that there was no such change in possession of certain cribs of corn as the rules of law required, and that the sale thereof was fraudulent in law, and void as to creditors. *Id.*, 43

5. A sale induced by fraud is not absolutely void, but is valid and binding if the innocent party, upon whom the fraud was perpetrated, sees fit to affirm the transaction. *Rigdon v. Walcott*, 352

6. If the defrauded party disaffirms the transaction, he must do so *in toto* and must offer to restore the *statu quo*. *Id.*, 352

7. If by the conduct of the party guilty of the fraud, it has been rendered impossible for the *statu quo* to be restored, a court of equity will not deny to the innocent party the right of rescission because of such impossibility. *Id.*, 352

8. The purchaser of property alleged to have been sold in fraud of the creditors of the grantor may be interrogated, he being charged with knowledge of such fraudulent intention as to his financial condition and

FRAUDULENT SALES. *Continued.*

ability, in proceedings instituted by such creditors to set aside the same.
Rhoades & Ramsay Co. v. Smith, 400

9. If such purchaser paid for the property, he can not be deprived of it, unless he took it with knowledge of the grantor's fraudulent intent, or with knowledge of such facts and circumstances as would put him on notice that such grantor was conveying the property for the purpose of hindering, delaying or defrauding his creditors. *Id.*, 400

GAMING.

1. Margins advanced to brokers on contracts made to be settled on differences may be recovered from the person or persons to whom they were paid. *Elder v. Talcott,* 439

2. Upon a bill filed to enjoin an action at law on a promissory note made by the complainant to defendants, and to recover a sum paid by the complainant to defendants on the ground that said note had been given, and said money paid by said complainant to indemnify and recompense said defendants for losses incurred by complainant to them in wagering or gambling contracts made for the purchase and sale of grain, it being alleged to have been agreed and understood that the dealing should be in differences, and that no grain should be received or delivered on such contracts; this court declines, in view of the evidence, to interfere with the decree for the complainant. *Id.*, 439

GARNISHMENT—See NEGOTIABLE INSTRUMENTS, 1.

1. In a garnishment proceeding, where the fund constituting the subject-matter of the litigation has, without authority, passed into the custody of a court of another State, the court has the power to order an intervening petitioner to sign a stipulation agreeing that the fund in question be restored to a receiver of the court, and upon the refusal of the interpellant to sign such stipulation, may properly strike his petition from the files. *Brown v. Gary,* 482

GIFT—See BANKS, 1, 2, 3.**GUARDIAN AND WARD—See ADMINISTRATION, 1; PARENT AND CHILD, 1; PARTNERSHIP, 1.**

1. Where, in a given controversy, certain exceptions to a guardian's account are overruled and the ward appeals, and an order sustaining other exceptions is excepted to by the guardian, who sues out a writ of error and brings the record to this court, assigning error thereon, and the ward assigns cross-error, both proceedings may properly be incorporated in one record. *Rawson v. Corbett,* 127

2. The failure of a guardian to attempt to loan the funds of his ward within a reasonable time from the receipt thereof, is a neglect of duty to such an extent as to make him liable for interest. In the case presented, sixty days are held to be such time. *Id.*, 127

3. A ward should not be called upon to pay attorney's fees, made necessary by the negligence of the guardian. *Id.*, 127

4. This court holds that defendant should not be credited with one-third of the income of certain farm lands, he claiming the same by virtue of his rights of dower in the real estate of his deceased wife, the fee thereof being in his wards. *Id.*, 127

GUARDIAN AND WARD. *Continued.*

5. As to such wards, damages for the non-assignment of dower could only be had from the date of filing a petition for such assignment. *Id.*, 127

6. The guardian, in such case, as surviving husband, not being entitled to any portion of such income because of no demand for assignment of dower, it follows, as a necessary consequence, that he will not be liable for any part of the expenditures in keeping up the affairs of the farm improvements and the taxes thereon. *Id.*, 127

7. Upon a claim filed against the estate of the ex-guardian of claimant, the same being alleged to call for an amount received by him as guardian and never paid over, a certain receipt having been given by her to him in his lifetime, in full of all demands, this court declines to interfere with a judgment in her favor for a sum named. *Blair v. Guthrie*, 127

8. Upon a claim filed against the estate of an ex-guardian of claimant, the same being alleged to cover an amount received by him as guardian and never paid over, a certain receipt having been given by her to him in his lifetime, in full of all demands, this court declines to interfere with judgment in her favor in a sum named. *Kattelman v. Guthrie*, 128

9. Compound interest can not be recovered from the estate of a deceased guardian, who, at his death, was indebted to his ward in a given sum, unless there was a wilful withholding of the funds in case of a suit by the ward against the estate for such funds so held as guardian. *Kattelman v. Guthrie*, 128

10. If the ward, after attaining majority, and without any fraud being perpetrated, permits his ex-guardian to retain and handle such funds, compound interest can not be allowed. *Id.*, 128

HIGHWAYS—See PARTIES, 1, 2, 3, 4.

1. Highway commissioners are empowered by Sec. 17, Chap. 121, R. S., in force July 1, 1883, to draw orders on their treasurer in favor of the owners of land taken for highway purposes, the same to be payable only out of a tax to be subsequently levied and collected for their payment. *Commissioners of Highways v. Deboe*, 25

2. Such orders should only be delivered to the land owners. Where they are disposed of to third persons, such irregularity can not, after its occurrence, be corrected by a writ of injunction. *Id.*, 25

3. No private right exists in a given person to recover damage sustained by the public alike, through the obstruction of a public road, unless he avers damage special to himself. *Storm v. Barger*, 173

4. The fact that the public has not worked a public road, does not destroy its character unless the condition thereof is such as to require it to be worked so as to enable the public to use the same. *Id.*, 173

5. Monuments and landmarks must prevail as against a plat in establishing the true line of a given road. *Hunt v. Commissioners of Highways*, 279

6. Upon a petition for mandamus, the prayer being for a peremptory order commanding commissioners of highways to proceed to remove

HIGHWAYS. *Continued.*

obstructions from a given highway, to use their legal power to designate the boundaries thereof by visible objects and to warn adjacent owners and occupants of land to desist from in any way obstructing the same in the future, this court declines, in view of the evidence, to interfere with the judgment denying the same. *Id.*, 279

HUSBAND AND WIFE—See ADMINISTRATION, 2, 3; INSOLVENCY, 1, 2, 3; MASTER AND SERVANT, 3.

1. At common law a husband was liable in an action at law at the suit of any person furnishing his wife with the necessaries of life suitable to her condition, if she was residing apart from him because of his wrong or with his consent. *Seybold v. Morgan*, 39

2. The husband has uniformly been held liable for the funeral expenses of the wife, though at the time of her death she lived apart from him of her own fault. *Id.*, 39

3. No right of action at common law existed in such case in favor of the wife either at law or in equity. She could only rely upon obtaining credit from those who were given a right of action against her husband. *Id.*, 39

4. A bill for separate maintenance can not be sustained in a case of separation by mutual consent, but only where the separation was without the wife's fault. The enactments of the statute touching separate maintenance in no wise affect the common law right of action in favor of persons supplying necessaries to the wife. Such right of recovery still exists by force of the common law, if the wife is living separate from her husband because of his fault or wrong, or with his consent. *Id.*, 39

5. Whether the separation in a given case was because of the fault of the husband, or was with his consent, is a question of fact for the determination of the jury. *Id.*, 39

6. A new trial should not be granted in such case, for the reason that the person with whom the wife lived, and who brings suit after her death against her husband to recover for necessaries furnished her in her life time, in which suit the plaintiff prevails, had in his possession a letter written by the husband to the wife which the husband insists should have been produced in evidence upon the trial of such suit, no notification or request to produce the same having been given, it being cumulative evidence only. *Id.*, 39

7. A wife may not, without authority, deliver to the consignor, goods sold and consigned to her husband, he having deserted his family. *Richelieu Wine Co. v. Ragland*, 257

8. Upon the mere fact that the consideration of a conveyance to a wife is furnished by her husband, no presumption of a resulting trust arises. *Sweet v. Dean*, 650

INJUNCTIONS—See APPEAL AND ERROR, 3; CROSS-BILLS, 2; GAMING, 2; HIGHWAYS, 2; MUNICIPAL CORPORATIONS, 2; PARTIES.

1. If public officers are about to violate an official duty which is public in its nature, and the violation of which affects the public in general

INJUNCTIONS. *Continued.*

alike, a citizen who is not threatened with some special injury or damage can not volunteer to become a complainant and prevent the violation by injunction. The remedy in such case is upon application to the proper public officer, who will proceed in behalf of the public. *Commissioners of Highways v. Deboe*, 25

2. The writ of injunction can only afford preventative relief. It can not be employed to correct a wrong or injury already done, nor to restore parties to rights of which they have been already deprived. *Id.*, 25

3. It is a good defense to a bill for an injunction, to show that the act sought to be prevented had already been done before the bill was filed. It is idle to speak of restraining the borrowing of money already borrowed, or the issuing of orders already issued. *Id.*, 25

4. A court of chancery by its writ of injunction affords the only complete and adequate remedy to prevent the doing of an illegal act. *School Directors v. Wright*, 270

5. A citizen is entitled to the aid of a court of equity to prevent the illegal expenditure of public funds in the erection of a school house upon a site not lawfully selected. *Id.*, 270

6. The fact that such citizen voted at an illegal election, the result of which decided no question, can not operate to deprive him of the right to institute such proceedings. *Id.*, 270

INSOLVENCY—See ASSIGNMENTS; JURISDICTION, 6; NEGOTIABLE INSTRUMENTS. 10.

1. A person insolvent when he sells certain property, can not, as against his creditors, make a gift to his wife of notes given upon such sale, nor can he invest her with title to them by way of a settlement in her favor, except for a valuable consideration. *McCaffrey v. Dustin*, 34

2. While a wife may refuse to execute a deed except on condition that a portion of the purchase price be paid or secured to her, where the evidence fails to show that she demanded it to be done, or that it was done as compensation to her for her possible interest in the land, her release of her right of dower therein can not be looked upon as constituting such consideration. *Id.*, 34

3. Where purchase money notes are made payable to the wife, by the mere voluntary act of her insolvent husband, the grantor, it is the presumption of the law that this was done with fraudulent intent as to his creditors, and is therefor void as to them. *Id.*, 34

4. A creditor violates no rule of law when he takes payment of his demand, though other creditors are thereby deprived of all means of obtaining satisfaction of their own equally meritorious claims. *Mathews v. Reinhardt*, 169

5. Admitting that a person subsequently insolvent, in purchasing goods, fraudulently obtained credit, and that a creditor to whom a bill of sale, covering the same was given, had knowledge of that fact, it can cut no figure unless there was a disaffirmance of the sale. *Id.*, 169

6. The purchase of goods from a person properly in possession

INSOLVENCY. *Continued.*

thereof under a bill of sale given by an insolvent can not be construed as aiding a fraudulent intent on the part of the insolvent, although the purchaser of the stock knew of the pecuniary condition of such insolvent. And this court holds that there is no evidence in the case presented, justifying the view that a purchaser named was a party to any fraudulent transaction. *Id.*, 169

7. While mere inadequacy of price is not *per se* ground for setting aside a transfer, it may be a circumstance to be considered in determining whether the sale was fraudulent; yet, unless so gross and palpable as to amount in itself to proof of fraud, it would not authorize a sale to be set aside. *Id.*, 169

8. A court of equity in cases of insolvency will regard the real parties in interest, and allow a set-off of demands in reality mutual. *T. S. M. E. Church v. Wetherell*, 414

9. Upon a petition that an amount in an insolvent bank be set off against an indebtedness due thereto, this court holds, in view of the evidence, that the order denying the petition can not stand. *Id.*, 414

10. Insolvency can be proved in proceedings at law without the evidence of the return of an execution unsatisfied; while that is required in cases where a creditor's bill is filed, in other cases insolvency can be proved the same as any other fact. *Woolrerton v. Taylor Co.*, 424

11. Insolvency is the condition of inability to pay one's debts as they fall due, or in the usual course of trade or business; such insolvency alleged in a bill seeking to enforce the liability under Sec. 16 of the statute on corporations, is sufficient. *Id.*, 424

12. It seems to have been contemplated in the case presented that the proceeds of certain goods would be mingled with the proceeds of the goods of an insolvent named. *Chapin & Gould v. Wabash Mfg. Co.*, 446

13. The mere fact of the payment of a debt by an insolvent, after he has determined to make an assignment, and who, thereafter, in pursuance of such determination does assign, does not constitute a fraudulent preference which will be set aside. *Illinois Paper Co. v. N. W. Nat. Bank*, 499

14. It has uniformly been held in this State in respect to the statutes for the prevention of frauds and perjuries, that both debtor and creditor must have had an intent to hinder, defraud or delay creditors in order to bring the transaction within the purview of the statute. *Id.*, 499

15. The petition of a landlady to the County Court in an insolvency case to award to her, as a preferred claim, rent that accrued under a lease, after the assignment, upon the ground that the assignee by his conduct elected to take the term under the lease as such assignee, refused. Such a claim, if valid, exists against the assignee personally. *Smith v. Goodman*, 530

INSTRUCTIONS—See APPEAL AND ERROR, 8; RAILROADS, 40.

1. An instruction not based upon the evidence should be refused. *P., D. & E. Ry. Co. v. Aten*, 68

2. The evidence in a given case being conflicting upon material

INSTRUCTIONS. *Continued.*

points, the instructions should be accurate, or taken as a series, the jury should thereby be correctly informed what the law is, as applicable to the facts proven. *P., D. & E. Ry. Co. v. Johns,* 83

3. An instruction failing to require the jury to base their findings on the evidence, should not be given. *Id.,* 83

4. Nor one setting forth that a railroad company failing to keep in good repair and *safe condition* its engines and machinery, whereby one of its employes is injured, is liable therefor, such employe, when injured, being in the exercise of reasonable care and prudence. *Id.,* 83

5. An instruction is erroneous which sets forth that there can be no recovery where a railroad embankment, which has been treated as a permanent obstruction by the parties to a given suit, was created more than five years previous to the institution thereof, the evidence showing the same to have been increased in height during such period. *O. & M. Ry. Co. v. Nuetzel,* 108

6. It is proper to refuse an instruction, the substance of which is contained in one given. *Id.,* 108

7. An instruction not based upon the evidence should be refused. *Id.,* 108

8. This court holds as proper the refusal of certain instructions asked on behalf of the defendant, the same setting forth in substance, first, that if it appears that the making of a certain embankment was warranted and necessary, the same being done carefully and in a workmanlike manner, actions for injuries caused thereby must be instituted within five years; and second, that a purchaser of land so injured takes the same in its depreciated condition, and without any right of action, they ignoring the question as to whether the work was done in accordance with skillful engineering and proper construction with reference to the rights of adjacent owners. *Id.,* 108

9. An appellate court can not determine whether instructions were properly refused without knowing what instructions were given. The abstract of an appellant is full notice to an appellee of the condition of the record in a given case, and such court must assume that if the record was deficient, his counsel would have had it corrected. *C., C., C. & St. L. Ry. Co. v. Richey,* 247

10. An instruction in a personal injury case, setting forth that defendant is liable for all damages occasioned by a certain negligent act, should not be given. *O. & M. Ry. Co. v. Simms,* 260

11. It is proper to refuse an instruction, the substance of which is embodied in one given for the same party. *O. & M. Ry. Co. v. Wangelin,* 324

12. Likewise one invading the province of the jury, by instructing them in a given case that there was no evidence to prove a material fact. *Id.,* 324

13. An instruction trenching upon the province of the jury, either by direct or implied assumptions of fact, or by describing what particu-

INSTRUCTIONS. *Continued.*

lar acts constitute care, or its reverse, should not be given. *City of Chicago v. Edson*, 417

14. In an action against a church for money loaned, where the evidence fairly presented a question of subrogation, this court holds that an instruction which ignored that question was erroneous. *Swedish Lutheran Immanuel Church v. Nelson*, 493

15. In the case presented it is *held*: The evidence raising a question whether, even if the plaintiff were entitled to recover, the church should not be credited for moneys collected and paid to the plaintiff by another defendant, that this question should have been included in an instruction to the jury purporting to give the law as to the amount of recovery, if any, to which the plaintiff was entitled. *Id.*, 493

16. Objection to an instruction on the ground that it contained an assumption of a disputed fact, held to have been cured by a previous paragraph of the instructions in the case presented. *Small v. Roberts*, 577

17. In the case presented, this court holds, the bank upon which certain checks were drawn having remained solvent, an instruction to the jury that it was the duty of the receiver of the checks to present the same for payment not later than the day after that on which they were received, was erroneous. *Shackelford v. Clarke*, 618

INSURANCE—ACCIDENT.

1. The fact that a person insured in an accident insurance company engaged in a fight, though he himself was not the aggressor, brings his injury received as the result thereof within a condition in the policy providing that it would not cover accidental injuries resulting from, or caused directly or indirectly, wholly or in part, by fighting. *U. S. M. A. Assn. v. Millard*, 148

2. Where such company contracts to indemnify a person injured for loss of time when wholly disabled from attending to his ordinary business, there can be no recovery, the injury being so slight as not to seriously interfere with the prosecution thereof. *Id.*, 148

3. This court reverses the judgment for the plaintiff in the case presented, he being an attorney whose thumb was injured during an altercation, said injury interfering in only a slight degree with the practice of his profession. *Id.*, 148

INSURANCE—FIRE—See NEGOTIABLE INSTRUMENTS, 4.

1. An insurance company can not retain a policy belonging to a person insured, and in case of loss, insist that he be governed by the terms thereof as to proofs of loss. *A. C. Ins. Co. v. Simpson*, 98

2. An insurance company can not, in case of loss, require the policy holder to appear with his books and accounts at its office in another State, there to be subjected to an examination under oath. *Id.*, 98

3. A policy holder may insist upon the presence of his attorney at such examination in the city where he resides, and will be justified in refusing to submit to the same where the adjuster of the company declines to accord such right. *Id.*, 98

INSURANCE—FIRE. *Continued.*

4. The object and purpose of the requirement of the law of this State providing that all foreign insurance companies doing business herein shall designate agents herein upon whom process can be served, is, that persons in this State holding insurance by such companies shall not be compelled to resort to other jurisdictions at great expense in time and money, in order to enforce their rights. Neither should such person be required to go outside this State for the purpose of arbitration, and to submit his proofs. A clause in a policy requiring such act as a condition precedent, to a right of recovery would be against public policy and void, and when the contract is silent in that regard no higher right would exist by reason of a notice and demand for compliance therewith. *Id.*, 98

5. This court holds, in the case presented, that a certain registered letter from the company to assured, which he refused to receive, must be considered to have reached his hand, but that the notice contained therein was not one which he was bound to accede to. *Id.*, 98

INSURANCE—LIFE—See MUTUAL BENEFIT ASSOCIATIONS.

1. The fact that, in an action on a benefit certificate, parol proof of the death, intestate, of the member, and that the plaintiff was his widow, is necessary, does not take the case out of the category of actions upon written instruments, the limitation of which is ten years. *Railway Conductors Mutual Aid Assn. v. Loomis*, 599

2. A provision of the by-laws of such organization, that members neglecting or refusing to pay assessments for thirty days from date of same cease to be members, is self-executing, but the constitution and by-laws being silent on the subject of notice, the law requires it. *Id.*, 599

3. Where the law requires notice and the method is not prescribed, it must be personal. *Id.*, 599

4. Under the constitution of the appellant the beneficiary of a certificate issued by it is not finally concluded by the action of the board of directors in refusing to allow his claim. *Id.*, 599

INTEREST—See GUARDIAN AND WARD, 2, 9, 10; JUDGMENTS AND DECREES, 4.

1. A higher rate of interest than six per cent can only be stipulated for on written contracts. *Friend v. Engel*, 386

INTERPLEADER—See JUSTICES, 2.

JUDGMENTS AND DECREES—See APPEAL AND ERROR, 4; MECHANICS' LIENS, 3, 4; PRACTICE, 3; PERSONAL INJURIES, 3, 4, 5; RAILROADS, 4.

1. This court declines to interfere with the judgment for the defendant in the case presented, the record not purporting to contain all the evidence introduced in the court below. *Metcalf v. Gunkel*, 200

2. In actions *ex contractu* the judgment must be against all who are served or who appear. *Cooper v. McNeil & Higgins Co.*, 350

3. The words of a decree must be read and understood in the light of the law. *Friend v. Engel*, 386

4. Where a decree provides that the rate of interest agreed to be paid by a person deceased shall be allowed, no legal or valid agreement being shown for more than six per cent, only that rate can be charged. *Id.*, 386

JUDGMENTS AND DECREES. *Continued.*

5. Where a trial court renders a decree variant from that directed by the Appellate Court in a given case, an appeal may be had therefrom, or a writ of error sued out. A court of equity will not look with favor upon a claim that such decree was rendered, where it is not made for some years after the rendition thereof. *Vail v. Arkell*, 466

6. This court holds that there is nothing in the charge that the master began the publication of notice of sale prior to the expiration of the time fixed for payment, that the amendment to the decree was purely formal, and that the decree remained a judgment as of the date of its entry. *Id.*, 466

7. Where an intervening petition has been properly dismissed the intervening petitioner can not question the correctness of the distribution of the fund in controversy between the parties to the proceeding. *Austin v. Austin*, 488

8. Appellant having failed to comply with the rules as to printing his abstract, the judgment must be affirmed. *Downey v. Hopkins*, 542

9. Judgments by default on returns of *nihil* upon writs of *sci. fa.*, to revive judgments against defendants who had ceased to reside in the States where such judgments were entered, will not support actions against such defendants in another State. *Robb v. Anderson*, 575

10. In the case presented, it being established that appellee had taken title to land in trust for appellant, under an agreement to transfer the title to it on payment of his expenses within a reasonable time, which time had long since elapsed, this court holds as correct, a decree ordering appellant to pay the expenses incurred by appellee by a time fixed, otherwise appellee's title to become absolute, a sale being unnecessary. *C. & C. R. M. Co. v. Scully*, 622

11. Where damages are assessed upon a count in which entire damages are claimed from both actionable and non-actionable causes joined, judgment should be arrested. *Chittick v. Town of Lake*, 632

12. In the case at bar, there being no sufficient allegations or proof to show that plaintiffs had suffered any damage because of the acts of defendant which they would not have suffered in any event, the judgment for defendant must be sustained. *Id.*, 632

13. Where, upon the whole record, it is obvious that the plaintiff is entitled to recover, and the damages assessed are reasonable, this court will, notwithstanding the fact that improper evidence was admitted, affirm the judgment in plaintiff's favor. *No. Chicago St. R. R. Co v. Cook*, 634

14. A judgment is, for or against strangers to it, evidence only of its own existence, and affects them only by the consequences that legally flow from that existence. *Sweet v. Dean*, 650

15. A judgment was entered by confession in pursuance of a warrant of attorney, and defendant promptly filed a motion to set aside the same and to be allowed to plead, filing an affidavit, which was contradicted, setting out that part of the judgment was entered for a larger amount than was due; this court holds that the court should,

JUDGMENTS AND DECREES. *Continued.*

under the circumstances, have allowed the defendant to plead to the disputed portion of the judgment. *Lanyon v. Lanz, Owen & Co.*, 654

JURISDICTION—See ASSIGNMENTS, 3, 5; ELECTIONS, 2.

1. A plea in abatement to the jurisdiction of the court by a defendant in a given case, made after full appearance by him, is unavailing. *Kingman & Co. v. Decker*, 303

2. Where a proceeding in a court of equity is to reach equitable assets, the remedy at law must first be exhausted, for the reason that there is no jurisdiction in equity while there remains an adequate remedy at law. *Woolcorton v. Taylor Co.*, 424

3. This court can not command one who is no longer a judge to exercise judicial functions—to do a judicial act. The settling of a bill of exceptions is a judicial act. *People v. Altgeld*, 460

4. This court has no power to settle a bill of exceptions, that is, make, or alter a portion of the record of a lower court as to a case tried therein; nor has it authority to set aside a judgment of an inferior court and grant a new trial unless reversible error is found in the record. *Id.*, 460

5. Where a court of superior general jurisdiction has proceeded to adjudicate and to decree in a matter before it, all reasonable intendments will be indulged in favor of its jurisdiction. *Austin v. Austin*, 488

6. All the original jurisdiction that belongs in ordinary cases to all courts, belongs to and may be exercised by a County Court in administering the assets of an insolvent. *Thirty-first Street Bldg. Assn. v. Wetherell*, 509

JUSTICES—See APPEAL AND ERROR, 10; MORTGAGES, 6; PARTIES, 4.

1. Justices of the peace are courts of interior and limited jurisdiction, and act only within the limits prescribed by statute. *Stafford v. Scroggin*, 48

2. The proceeding by way of interpleader authorized in courts of record, is not applicable to cases of attachment before justices of the peace. *Id.*, 48

3. In the case presented, this court holds that the justice in question must be presumed to have been acting under the provisions of Chap. 79, R. S., rather than under Sec. 29, Chap. 11, R. S., and that from his decision an appeal could only be taken by filing an appeal bond within five days. *Id.*, 48

LANDLORD AND TENANT—See INSOLVENCY, 15.

1. A tenant bound to restore premises named, in good order, "loss by fire or inevitable accident, or ordinary wear excepted," is obliged to repair a window broken by a stone accidentally kicked by a passing team. *Peck v. Scoville Mfg. Co.*, 360

2. In such case, the burden of proving that the window was broken by inevitable accident, is upon the tenant. *Id.*, 360

LIMITATIONS—See AGENCY, 3, 4, 5; NEGOTIABLE INSTRUMENTS, 5.

1. Five years is the period of limitation in this State to an action on the judgment of another State. *Robb v. Anderson*, 575

MALPRACTICE.

1. Where a prescription is, by a *lapsus calami*, improperly written, as result of which the person taking it dies, the fact that the druggist who fills the prescription may have been negligent, is no defense to the physician writing it, in an action against him for malpractice. *Murdock v. Walker*, 590

MANDAMUS—See HIGHWAYS, 6; JURISDICTION, 3.

1. Mandamus is a remedy at law and lies to compel the performance of a legal act and the proper expenditure of public funds. *School Directors v. Wright*, 270
2. The writ of mandamus should not issue where the right sought to be enforced is doubtful; and the party praying for its issuance must show a clear legal right to the remedy afforded by it, before it will be ordered. *Hunt v. Commrs. of Highways*, 279

MASTER AND SERVANT—See FELLOW-SERVANTS, 1; PERSONAL INJURIES; RAILROADS.

1. The extent of an employer's duty is to use ordinary care to provide machinery and appliances for the use of his employes such as are reasonably safe and fit for the purposes they are intended to serve. *Consolidated Coal Co. v. Bonner*, 17
2. In an action brought to recover for personal injuries suffered through the alleged negligence of a coal company in continuing the use of a defective door latch, this court holds that the same resulted from the careless use thereof, that it was not out of repair but reasonably safe and fit for its use, and that the judgment for the plaintiff can not stand. *Id.*, 17
3. In view of Sec. 8, Chap. 68, Starr & C. Ill. Stats., a wife is not entitled to payment for services rendered her husband, while ill through injuries suffered during the course of his employment, and in an action brought to recover from the employer therefor, the jury should not be instructed that the ministrations of the wife should be considered in the estimation of damages. *P. D. & E. Ry. Co. v. Johns*, 83
4. The consequences of an engineer's neglect to report the defective condition of an engine are not assumed by a laborer accepting employment upon the road. He is not bound to inform himself whether such report has been made, or whether the engine was in good repair. *Id.*, 83
5. In view of the evidence in the case presented, this court holds that the relation of master and servant existed between the parties thereto; that the plaintiff was not guilty of negligence in remaining at work after notifying the defendant of defects in a certain structure, a promise to make the same safe having been given; that he did not assume the risk of so remaining, and that the judgment in his favor can not be interfered with. *St. Clair Nail Co. v. Smith*, 105
6. It is for the jury to determine what the oral contract of service was in a given case, and whether it was complied with by the employe. *Rowland v. Records*, 198
7. The law impliedly imposes upon a traveling salesman the duty

MASTER AND SERVANT. *Continued.*

of exercising reasonably good judgment and care in making sales. *Id.*, 196

8. This court holds that the evidence in the case presented did not warrant the allowance of the attorney's fee in question. *Id.*, 198

9. In an action brought by a servant to recover for personal injuries alleged to have been suffered by him through obeying the orders of his employer's vice-principal to splice a rope at a certain time and place, this court holds, in view of the evidence, that the judgment for the plaintiff can not stand. *Wiggins Ferry Co. v. Heilig.* 238

10. It is a question of fact for the jury to determine in a personal injury case whether or not the person injured knew, at the time he went to work at the machine at which he was working when killed, that it was defective and unsafe, and with such knowledge, voluntarily incurred the peril of operating it, and whether or not he was in the exercise of ordinary care for his own safety at the time of the injury. *T. St. L. & K. C. R. R. Co. v. Bailey.* 292

11. In such case, evidence going to show that the defendant's employes regarded the same to be unsafe, is admissible. *Id.*, 292

12. In an action brought by the administratrix of a railroad employe to recover for his death, the same being alleged to have been caused through its negligence in placing him at work with a defective engine, this court declines, in view of the evidence, to interfere with the judgment for the plaintiff. *Id.*, 292

13. Where an employe suffers personal injury through the negligent construction of an appliance he is obliged to use, no notice of its condition to the employer is necessary in order to warrant a recovery. *Crown Coal Co. v. Hiles.* 310

14. It is not necessary in an action brought to recover for the death of a servant through the alleged negligence of his employer, in order to recover substantial damages, that proof be introduced as to the amount contributed by deceased in his lifetime toward the support of the next of kin, in view of the uncontradicted facts that he actually did contribute to the relative's support, and that such person actually was in need of help. *O. & M. Ry. Co. v. Wangelin.* 324

15. How such pecuniary damage is to be measured, must be largely left to the discretion of the jury in a given case. This court holds the sum of \$2,000 to be reasonable in the case presented. *Id.*, 324

16. A master must use reasonable diligence to provide his servant with reasonably safe machinery and apparatus, which such servant is employed to operate. This law is not only applicable to the machinery owned by the master, but to other machinery and apparatus owned by another person than the master, which the servant is required in the line of his duty to use, and the rule applies to cars of other roads. *Id.*, 324

17. No defect is latent that an inspection will disclose. *Id.*, 324

18. A master is not entitled to notice of defects in appliances which he is bound to furnish in proper shape for the work they are called upon to perform. *Id.*, 324

MASTER AND SERVANT. Continued.

19. In the case presented, this court holds that defendant was guilty of negligence in furnishing a certain car belonging to another road for the use of its employe, who was killed through such use, without giving him notice of its condition. *Id.*, 324

20. The presumption in a personal injury case is that the servant injured knew nothing of the dangers of the premises in which he was employed, in the absence of proof to the contrary. *City of Chicago v. Edson*, 417

21. Under the allegation of expenses, proof of liabilities incurred is admissible. *Id.*, 417

22. Although the plaintiff in a personal injury case is working, when injured, for a given salary, in estimating his pecuniary loss, evidence of his capacity to earn more money in another employment for which he was fitted, is competent. *Id.*, 417

23. In an action brought to recover for the death of a brakeman, the same being alleged to have occurred through the negligence of a railroad company named, the contention being whether the defendant, against whom judgment was obtained, was responsible, the plaintiff having been employed by a combination of companies doing business under a certain name, this court holds, in view of the evidence, that defendant company was in said combination, and that it was liable, severally or jointly, with the other companies so operating, for the injury in question. *W. C. R. R. Co. v. Ross*, 454

24. The owner of a manufacturing plant is under no obligation to make all parts of the premises safe for a stranger to them to ramble through in the night, even if such person was at work for the owner in a part of the premises where there was no danger. *C. & A. S. & R. Co. v. Collins*, 478

MECHANICS' LIENS.

1. For the lack of a statement in compliance with Sec. 35, Chap. 82, R. S., this court holds that the plaintiff in the case presented can not recover for work performed and material furnished. *Wieska v. Imroth*, 357

2. Sec. 29 of the Mechanics' Lien Act does not extend the right to a lien to an employe, or a sub-contractor of a sub-contractor. *Berkowsky v. Sable*, 410

3. One who has no right to a lien can not maintain an action at law to obtain a personal judgment under the terms of Sec. 37 of the Mechanics' Lien Act. *Id.*, 410

4. In the case presented, this court holds that the plaintiff's right to his judgment in the court below is clear under Sec. 35, Chap. 82, R. S., in force when his action accrued, and declines to interfere therewith. *Hughes v. Russell*, 430

5. The making of the statement required by Sec. 35 of the Mechanics' Lien Law is a condition precedent to the maintenance of an action by the contractor upon his contract. *Bonheim v. Meany*, 532

6. It appearing upon the face of a bill asserting a mechanic's lien, that complainants had delayed filing the same beyond the statutory

MECHANICS' LIENS. *Continued.*

period, and nothing appearing to excuse such delay, a demurrer to the bill was properly sustained. *Rittenhouse v. Sable*, 558

MINES—See SALES, 4, 5.

MISNOMER.

1. That a party is known by one name as well as by another is a good replication to a plea of misnomer. *Parmelee v. Raymond*, 609

MORTGAGES—See APPEAL AND ERROR, 12; WRITS OF ASSISTANCE.

1. In proceedings to foreclose a chattel mortgage on heavy machinery, a subsequent purchaser of the same and the land upon which it is located, with notice of the mortgage, takes the premises subject to the chattel mortgage, and a subsequent mortgagee would stand in no better light than a subsequent purchaser. *Ellison v. Salem Coal & Mining Co.*, 120

2. A clause in a real estate mortgage setting forth that it is given subject to a chattel mortgage is notice of such fact to the mortgagee. *Id.*, 120

3. Where, in such case, the chattel mortgage is not, in fact, executed until after the real estate mortgage, such clause will protect the mortgagee in the chattel mortgage by way of estoppel. *Id.*, 120

4. Persons named were made defendants to certain cases wherein material-men's liens were sought to be enforced upon the property of a coal company. They set up a lien by virtue of a certain contract and chattel mortgage upon machinery furnished said coal company, and filed a cross-bill to foreclose such mortgage, there being a real estate mortgage upon the property where such machinery was located; this court holds that said cross-bill was properly filed; that the property described in the chattel mortgage was not so attached to the realty as to become a part thereof, and that the lien of the mortgagees therein was not subject to either the lien of the material-men or the real estate mortgagees. *Id.*, 120

5. This court affirms the decision of the court below, holding that the evidence in the case at bar was insufficient to establish that the deed in evidence was intended by the parties as security for a loan. *Story v. Springer*, 495

6. It is not necessary for the plaintiff, in an action based on a chattel mortgage, to prove that, at the acknowledgment of the mortgage, the justice made the entry in his docket required by the statute. *Calumet Paper Co. v. Knight & Leonard Co.*, 566

7. The statute forbidding a sale of property to be made under power of sale contained in a mortgage or trust deed where the owner of the equity of redemption of the premises covered by the mortgage or deed had died before such sale, is not retroactive so as to nullify provisions of a deed which were legal at the time the deed was executed and delivered. *Fisher v. Green*, 595

MUNICIPAL CORPORATIONS—See ATTORNEY AND CLIENT, 1, 2, 3; CONTRACTS, 10; OFFICERS; PARTIES.

1. Where a city council acts favorably upon a petition signed by

MUNICIPAL CORPORATIONS. *Continued.*

property owners, such owners are estopped from claiming damages occasioned by granting such request, likewise from objecting that the petition was not sufficiently signed. *Joyce v. E. St. L. E. S. Ry. Co.*, 157

2. Where a person has influenced a city council to act favorably through so signing, and in consequence a third person has been induced to incur expense and liability through the action of the city council so brought about, such signer can not enjoin the prosecution of the work in question. *Id.*, 157

3. In view of Par. 23, clause 3, Chap. 34, Starr & C. Ill. Stats., a county board can take steps to defeat the collection of a tax assessed to pay an apparent, but in fact an illegal debt of the county, and procure a final adjudication declaring void and invalid certain bonds, to pay the interest upon which such tax was assessed. *Co. of Franklin v. Layman*, 163

4. In a controversy touching the violation of a municipal ordinance requiring truckmen and other common carriers to be licensed, this court holds that the penalty provided for was intended to be imposed upon those only who carried on business within a given municipality without a license, and that defendant, who hauled goods from another city wherein he was licensed, to a depot within the boundaries of complainant, could not be considered as having been guilty of a breach of said ordinance. *City of East St. Louis v. Buz*, 276

5. One who deals with agents of a municipal corporation is bound to know their authority, and if he receives from them money which they have no legal authority to pay, it may be recovered in an action by the municipality. *County of Cook v. Wren*, 388

6. A county may recover any excess of compensation paid a county commissioner over and above what was legally due him, and the same is a proper matter of set-off in an action brought to recover on a warrant issued to such person in payment of his *per diem* as commissioner. *Id.*, 388

MUTUAL BENEFIT ASSOCIATIONS—See INSURANCE—LIFE.

1. An ex-member of a mutual benefit association must exhaust his remedy in the order before he can appeal to the courts, either for reinstatement or damages for his expulsion. *Blumenfeldt v. Korschuck*, 434

2. If a member, or the beneficiary under a certificate to him, is suing the order for keeping him out of the lodge, or for money due upon a certificate, and an expulsion is set up as a defense, the question may be made whether the expulsion is valid or void. *Id.*, 434

NEGLIGENCE—See RAILROADS.

1. The question of contributory negligence in a given case is for the jury. *L. & N. R. R. Co. v. Shelton*, 220

2. In an action brought to recover for personal injuries alleged to have occurred through the negligence of the owner of a building in process of construction, this court declines, in view of the evidence, to interfere with the judgment for the plaintiff. *Burt v. Wrigley*, 367

NEGOTIABLE INSTRUMENTS. See GAMING, 2.

1. One who buys a note after its maturity, takes it subject to all equities and defenses existing between the original parties to the instrument. A past due note is already dishonored and comes to one about to buy it, tainted with suspicion and discredited upon its face. A person buying it, takes it subject to any right acquired by an attaching creditor by garnisheeing the maker. *McCaffrey v. Dustin*, 34

2. An indorsement without date is presumed to have been made before the maturity of the note, but this is a *prima facie* and not a conclusive presumption, and may be rebutted by evidence. To so rebut, it is competent to show that the note remained the property of the payee after its maturity, and the acts or declarations of the payee while having possession of the note as to its ownership, are admissible to rebut this legal presumption. *Id.*, 34

3. The purchaser of a note, due and dishonored when offered to him for sale, is in duty bound to make inquiry as to the rights of the former holder and the liability of the maker, and he is chargeable with notice of all he could have learned had he made inquiry should he fail to do so. *Id.*, 34

4. In an action brought by an insurance company to recover upon a note given for a premium, the defendant contending that the application misdescribed the location of the property insured, and that he had never received the policies, this court holds that the verdict for the defendant was against the law and the evidence, and that the same can not stand. *Phenix Ins. Co. v. Stile*, 233

5. A promise by a surety on a note to pay the same in whole or in part must be in writing in order to take it out of the statute of limitations. *Davis v. Mann*, 301

6. If part payment is relied upon it only operates as to the one making or contributing thereto. *Id.*, 301

7. A note given as collateral security for a pre-existing debt is founded upon a valid consideration. *Blackwood v. Bowen*, 320

8. In an action brought to recover upon a note given as collateral to a note for a like sum, secured by a trust deed upon real estate, an extension of the loan represented thereby having been arranged, a foreclosure subsequently taking place, and a deficiency judgment against the makers of said collateral note entered, this court holds that the latter note was based on a sufficient consideration; that the usury law of the State of New York in view of Sec. 8, Chap. 74, Ill. Stats., did not apply thereto; and declines to interfere with the judgment for the plaintiff. *Id.*, 320

9. This court holds as proper, in the case presented, the refusal to strike the declaration from the files and dismiss the suit on account of an alleged variance between the writ and declaration, and for an alleged misjoinder of counts in debt and assumpsit in said declaration, on the ground that there is no variance, and that there is no count of debt in the declaration. *Id.*, 320

10. The secondary liability of an assignor on a promissory note may be made out by showing that the maker was insolvent without proving

NEGOTIABLE INSTRUMENTS. *Continued.*

that a suit was brought against him and was unavailing; where the facts show that such an action would be unavailing, no action need be brought to establish the assignor's liability. *Woolverton v. Taylor Co.*,
424

11. The evidence in the case at bar was insufficient to justify a finding that appellant bank had notice of the dissolution of appellee's firm prior to the executing of the notes sued on. *Dixon National Bank v. Spielman*,
475

12. Upon rehearing, this court holds that notice, that as between a person named and the defendant the latter had become but a surety, was as effectual to preclude the former from pledging the credit of the defendant as notice of the dissolution, if received, would have been, and that the judgment for the defendant must stand. *Id.*,
475

13. Accommodation notes are made to be used, and in the hands of one who, before due, *bona fide* receives them for value, are as good as any other notes. *Hodges v. Nash*,
648

NEW TRIAL—See HUSBAND AND WIFE, 6; JURISDICTION, 4; PRACTICE, 1.

1. A new trial should not be granted upon the ground of newly discovered evidence, the same being merely cumulative in character. *Davis v. Mann*,
301

2. A party is not ordinarily entitled to a new trial upon the ground of newly discovered evidence, unless he shows that the same is material and of a controlling and conclusive character. *City of Chicago v. Edson*,
417

3. It seems that upon a motion for a new trial, affidavits being filed, counter affidavits should not be received. *Id.*,
417

OFFICERS—See INJUNCTIONS, 1; MUNICIPAL CORPORATIONS, 3, 6; PRINCIPAL AND SURETY, 1, 2, 3, 4, 5, 6, 7, 8.

1. A person taking the office of county commissioner is bound to know the location of the institutions under the control of the county board, and that the management of them will involve personal inspection thereof by it. Where the compensation of such officers is fixed by law at so much each per day, such sum covers all duties, whether their performance involves personal expense in traveling or not. *County of Cook v. Wren*,
388

2. In such case a commissioner can recover for his services only the sum resulting from multiplying the number of days of service by such amount. *Id.*,
388

3. Where the estimate for the annual appropriation contains an amount for "miscellaneous expenses," such expenses must be looked upon to mean expenses of the county, not personal expenses of the commissioners. *Id.*,
388

4. If conveyances become necessary for the transportation of the county board, or its committees, in the discharge of board functions, they constitute board or county expenses, and are not incurred by individual commissioners, nor are they to be paid to them. *Id.*,
388

OPTIONS—See GAMING.

PARENT AND CHILD—See ADMINISTRATION, 2, 3, 4, 5, 6.

1. When a step-father takes his step-child into his family as a member, and services are rendered by the child and accepted, there is no liability on the part of the child for board. But in the settlement of estates and the accounting of guardians, the rule also is, that equitable rules will be applied. Therefore, it is held in the case presented, the step-father having kept his step-children in his family after their mother's decease, she having requested it, they having an estate and he being financially embarrassed, that he was entitled to compensation for their board. *Rawson v. Corbett*, 127

PARTIES.

1. As a general rule any tax payer of a given town has sufficient interest in the actions of highway commissioners to constitute him a proper party to institute an action to restrain them from the performance of an unlawful official act, if such illegal act will specially injure or damage him; if the threatened act will operate to increase the burden of his taxation, or the aggregate indebtedness of the town, such would be regarded as an individual injury and damage to him. *Commissioners of Highways v. Deboe*, 25

2. A bill filed at the instigation of others by an individual who has no private interest involved, other than, or different from, the body of the tax payers of a given town, should not be entertained. *Id.*, 25

3. This rule is limited to cases where the action is instituted by the tax payer in good faith and for the protection of his own interest. Relief will not be granted if it appears that he is merely a colorable plaintiff suing really in behalf of other parties in interest. *Id.*, 25

4. Parties can not be sued jointly before a justice who can be so sued in a court of record on the same cause of action. *Fischer v. Spang*, 378

PARTNERSHIP.

1. The fact that one member of a firm is in danger of a criminal prosecution will not justify all of its members giving a chattel mortgage upon firm property to secure his individual debt, the result being to render worthless a firm indebtedness to wards of another member thereof. *Rawson v. Corbett*, 127

2. In view of the evidence in the case presented, this court holds that certain commissions received by one of two partners were not the receipts of the firm, or earnings in which the other was entitled to any share, or for which the former could be required to account. *Metcalf v. Bradshaw*, 286

PERSONAL INJURIES—See APPEAL AND ERROR, 20; INSTRUCTIONS, 10; FELLOW-SERVANTS; MASTER AND SERVANT; NEGLIGENCE, 2; RAILROADS; STREET RAILWAYS.

1. A plaintiff in a personal injury case, to maintain his action, is not required to establish by the proof all the material averments in all the counts of the declaration; he need prove the material averments of one count only. *P. D. & E. Ry. Co. v. Johns*, 83

2. An individual owes a duty to a person under a contract to per-

PERSONAL INJURIES. *Continued.*

form a specific service for him, to have a structure used in and about the same, reasonably safe and secure, although he be not a servant regularly employed. *St. Clair Nail Co. v. Smith*, 105

3. Trial judges should exercise their powers to cut down excessive verdicts in personal injury cases. *City of Chicago v. Leseth*, 480

4. This court declines to interfere with a judgment for \$15,000 in the case presented. *Id.*, 480

5. A non-professional man should not be permitted to tell what pain and inconvenience he suffered as the result of the injury. *W. Chicago St. Ry. Co. v. Cook*, 634

PLEADING—See CRIMINAL LAW, 1; PRINCIPAL AND SURETY, 14; TRESPASS, 1.

1. An answer is deemed impertinent if it goes beyond the allegations of the bill to state some matter not material to the case and not constituting a defense. *Commissioners of Highways v. Deboe*, 25

2. Allegations which are unbecoming the dignity of the court to hear, or are contrary to good manners, or charge some person with an offense, are deemed scandalous, unless such matters are proper to the defense of a given bill. To be deemed scandalous the matter must, at the same time, be impertinent; for no matter how scandalous it may be in matter of fact, it is not scandalous within the meaning of the word as used in equity pleading, if it is pertinent to the case. *Id.*, 25

3. A complainant, in chancery, must recover upon the case made by the bill. If, upon a hearing, a good case appears in the evidence, if it does not correspond with the allegations of the bill relief can not be given. *Id.*, 25

4. If an answer presents a complete defense to the case as made by the bill, but in doing so discloses a good case for the complainant upon another ground than that which is set up in the bill, the complainant may avail himself of the new case by applying for and obtaining leave to amend his bill, and then setting out the facts that will warrant a decree in his favor. *Id.*, 25

5. A demurrer to a declaration admits the facts that are well averred therein, and a given defendant is estopped from afterward asserting to the contrary. *Neal v. County of Franklin*, 267

6. Pleadings are to be construed most strongly against the pleader. Where a declaration avers that a resolution of a county board was rescinded on the day of its passage without stating that any meeting intervened between its adoption and rescission, it will be assumed that the adoption and rescission occurred at the same meeting. *Id.*, 267

7. Whenever facts alleged involve a question of law, they must be so stated that the court can see that the legal conclusion relied upon follows. *People v. Zingraf*, 337

8. The lack of an express averment of *scienter* is not fatal. *Ransford v. Willets*, 436

9. It was discretionary with the court in the case presented to refuse, at the close of the plaintiff's case, to allow the defendants to file a plea of justification. *Calumet Paper Co. v. Knight & Leonard Co.*, 566

PRACTICE—See APPEAL AND ERROR, 9, 10, 14, 15; CONTRACTS, 5; GARNISHMENT.

1. A new trial will not be granted to enable a party to impeach a witness where there is other credible evidence that tends to sustain him.

Keith v. Knoche, 161

2. It is proper to deny a motion for a continuance upon the ground of absence of a witness, it being alleged that he would testify in a certain manner if present, when it is admitted by the other side that he would so testify. *Id.*, 161

3. The judgment is reversed in the case presented, the record containing no placita or convening order of court, it not appearing before what judge the cause was tried, or whether it was heard before the judge who signed the bill of exceptions. It is not the office of the bill of exceptions to supply any part of the record proper. *St. L. A. & T. H. R. R. Co. v. Goodall*, 234

4. Sec. 30 of the Practice Act, which permits a defendant having claims or demands against the plaintiff in a given action, to plead the same, or give notice thereof under the general issue, or under the plea of payment, and provides that the same or such part thereof as he shall prove on trial, shall be set off and allowed him, is not mandatory. It differs in that respect from Sec. 49, Chap. 79, R. S., which requires parties to suits before justices to bring forward all existing demands which are of such a nature as to be consolidated, and which do not exceed \$200 when consolidated. *Tompkins v. Gerry*, 255

5. This court declines to consider any question in the case presented, there being no assignment of errors as required by the rules hereof. *Conlon v. Manning*, 363

6. It is the professional duty of counsel to know the condition of the records of the causes in which they are engaged, and if they by their conduct lead the court to assume a particular condition, and the court has acted upon that assumption, the court will not go back upon itself, unless justice requires it. *Fischer v. Spang*, 378

7. If parties to a suit expressly or tacitly waive compliance with a rule of this court, it may in its discretion permit them to proceed upon the real merits of the controversy between them. *Id.*, 378

8. The report of a master is conclusive until it is shown to be wrong, and in order to raise the question whether it is right or wrong, the party dissatisfied with it must, by objections before the master, repeated as exceptions before the court, point out with reasonable definiteness the error or mistake alleged. *Waska v. Klaisner*, 611

9. On an application for a continuance on the ground of the absence of a material witness, the affidavit must state that the party has no other witness by whom he can prove the facts stated in the affidavit as completely as by the absent witness. *Hodges v. Nash*, 638

PRINCIPAL AND SURETY—See NEGOTIABLE INSTRUMENTS, 5, 12.

1. All moneys that come into the hands of a township treasurer, as such, must necessarily be and remain there in contemplation of law and in the real sense of the bond given by him, as to the obligee, and for all the purposes of an action upon such bond until they are accounted for

PRINCIPAL AND SURETY. *Continued.*

by some act or fact which legally discharges him from liability for them. Where they have thus come during a former term, and have not been so accounted for, they must be deemed to have come thence into his hands as treasurer for the one succeeding. *Trustees of Schools v. Peak*, 51

2. Not denying the fact that a balance is due from such officer, his sureties are estopped from denying it to be in his hands, and having voluntarily executed the bond, public policy would forbid that they should escape responsibility by showing that at and since the commencement of a given term he was never able to produce it. *Id.*, 51

3. The questions whether there was a balance due from such treasurer and its amount, are not conclusively settled against the sureties upon his bond by the statement of the amount thereof in his report. *Id.*, 51

4. Even when accepted by school trustees, such report can hardly have the force and effect of a settlement, and such acceptance should not estop them from asserting error therein subsequently discovered. *Id.*, 51

5. Upon proof that a treasurer had received other moneys than those accounted for by him, school trustees can recover the same in an action on his bond, although their omission may have been entirely innocent on his part. Errors satisfactorily shown may ordinarily be corrected at law. *Id.*, 51

6. In the case presented, this court holds, the treasurer being dead, that certain books and vouchers were admissible not only because they were the records of his official acts, which the law required to be kept, but because they were parts of the *res gestæ*. and for the further reason that they were as competent to prove a negative (that entries of alleged charges and credits were not made), as an affirmative. *Id.*, 51

7. It is not incumbent upon a surety to show how errors came to be made by his principal in such case, it is enough to satisfy the jury that moneys had been properly paid out by him for which he received no credit. *Id.*, 51

8. A treasurer is entitled to credit for school orders paid by him although the same may have been informal, the amount thereof being properly due for something received by the district. *Id.*, 51

9. A mere offer in a given case, to pay the costs of a recognizance, is not a literal compliance with the statute providing that a forfeiture thereof shall not be set aside until such costs are paid, and until actually paid, sureties who have caused the arrest and return of an absconding defendant, are not entitled to an order setting aside such forfeiture. *People v. Smith*, 217

10. No action can be maintained by a surety on a warranty to his principal. *Kingman & Co. v. Decker*, 303

11. When the condition of a bond is to abide the order or judgment of a court, the action of a given court binds the surety, though he had no opportunity to influence it; but if it be to perform an act *in pais*,

PRINCIPAL AND SURETY. *Continued*

then such a judgment against the principal is not evidence against the surety. *People v. Zingraf*, 337

12. If, upon the schedule presented by a debtor, it was the duty of an officer to release property attached, as exempt, and he failed to do so, all the facts from which the duty arose should be stated in the declaration in an action upon the officer's bond. *Id.*, 337

13. In an action on such bond the recovery must be against all the defendants, or none. *Id.*, 337

14. This court holds that the averment of the declaration in the case presented was insufficient, and declines to interfere with the judgment for the defendants. *Id.*, 337

QUO WARRANTO—See ELECTIONS, 2, 3.

RAILROADS—See CARRIERS, 1; FELLOW-SERVANTS, 1; INSTRUCTIONS, 5, 8; *Witnesses*.

1. In an action brought to recover from a railroad company for injuries alleged to have occurred to a passenger through its negligence, he having jumped from the train in question, this court holds, in view of the evidence, that the judgment for the plaintiff can not stand. *M. & O. Ry. Co. v. Klein*, 63

2. In the case presented, this court holds as improper the admission in evidence of certain alleged declarations of servants of the railroad company touching the condition of the road, and the liability of the company, the same not being a part of the *res gestæ*. *Id.*, 63

3. To recover in such case plaintiff must have been in the exercise of ordinary care. *Id.*, 63

4. Failure to comply with the statute concerning signals by a railroad company will not justify a judgment against it in an injury case unless it appears by the facts and circumstances preponderating, that the accident was the result of such neglect. *P. D. & E. Ry. Co. v. Aten*, 68

5. Evidence that tracks of a horse or horses apparently made while running, were seen on the road-bed after the accident, is not sufficient to authorize a verdict of guilty of negligence in the management of a given train in an action brought to recover for the killing of horses, through the alleged negligence of a railroad company. *Id.*, 68

6. Evidence going to show that such train was going at a high rate of speed does not necessarily import negligence. *Id.*, 68

7. Where it is contended that animals were injured through failure to properly fence, the pivotal point is, as to the condition of the fence where they went upon the track. There can be no recovery if such place was properly fenced. *Id.*, 68

8. This court holds as proper the admission of evidence in the case presented, touching the condition of a fence at places other than where the horses in question went upon the track, the same being insufficient to turn hogs. *Id.*, 68

9. A railroad company is bound to bring to the construction of its works a degree of engineering skill that will permit no negligent and improper construction. *O. & M. Ry. Co. v. Thillman*, 78

RAILROADS. *Continued.*

10. The common law duty of a railroad company is to so construct its road, where it crosses a water-course, as not to impair the usefulness thereof. *Id.*, 78

11. Such duty is a continuing one, and each overflow caused by the negligence or want of skill of the company, creates a new cause of action for damages suffered, and this is so, although the party injured acquired his interest after the creation of the obstruction. *Id.*, 78

12. It is for the jury to determine from the evidence whether a flood was an extraordinary one, but the court may give the jury a legal test by which to apply the evidence and determine the fact. *Id.*, 78

13. In an action brought to recover from a railroad company for the killing of stock, the same being alleged to have occurred through its negligence, the report of the section foreman to the company and his opinion as to the cause of the injury is not competent testimony. *O. & M. Ry. Co. v. Atteberry*, 81

14. A railroad company, whose road is built across a highway, owes the duty of restoring the same to its former condition, or in a sufficient manner as near as may be, so not to materially impair its usefulness, and this is a continuous duty. *O. & M. Ry. Co. v. Town of Bridgeport*, 89

15. A railroad company is under no obligation to build or keep in repair a road or bridge on its right of way, unless the same is rendered necessary by the construction of the railroad. *Id.*, 89

16. The duty of a railroad company does not end with the construction of approaches to a bridge and crossings, and keeping the same in repair. When there is a change of condition it is bound to conform to new circumstances and conditions arising in the future, in altering such places from time to time as it becomes necessary. *Id.*, 89

17. In an action brought by a municipality to recover from a railroad company a sum expended in the erection of a bridge over a stream running parallel with said railroad, and upon its right of way, said bridge being a portion of a street, this court holds that the verdict for the plaintiff is against the law and the evidence, and that the same can not stand. *Id.*, 89

18. There can be no recovery from a railroad company for the killing of stock within the limits of unfenced station grounds, the same being required to be open for the convenience of the public, no negligence except failure to fence being alleged. *C., C., & St. L. Ry. Co. v. Abney*, 92

19. To walk upon a railroad track without looking in both directions to discover approaching engines or trains, where the exercise of such precaution would discover the one or the other, is such negligence as will prevent a recovery for injury suffered, unless the injury was wilfully or wantonly inflicted. *S. & St. L. Ry. Co. v. Stotlar*, 94

20. The reckless conduct of the plaintiff upon the occasion of his injury precludes a recovery in the case presented. *Id.*, 94

21. A railroad company erecting a solid embankment over a water-course, can not escape liability for injury caused by flowage of adjacent

RAILROADS. *Continued.*

lands upon the plea that the same resulted from an extraordinary flood; a proper outlet should be provided in such cases. *O. & M. Ry. Co. v. Nuetzel*, 108

22. In an action brought to recover from a railroad company for injuries to a horse, alleged to have occurred through its negligence, this court holds that the jury were justified by the evidence in finding defendant guilty of wilful negligence in permitting the gate to remain insecure and unfit for the use it was put to, for the length of time it was maintained in that condition after notice. *L. & N. R. R. Co. v. Shelton*, 220

23. In such case it is a question of fact for the jury to determine from the evidence, whether a given fence was so negligently and improperly constructed and maintained as to be more dangerous to stock not breachy or unruly than it would have been if reasonable care had been used in building and maintaining it, and whether or not these acts of negligence were the proximate causes of the injury. *Id.*, 220

24. A railroad company, irrespective of a statute, may erect fences inclosing its right of way, and construct gates at farm crossings, but in the exercise of such rights it must so act as not to negligently injure another; failing in this regard it must respond in damages for injuries arising from such failure. *Id.*, 220

25. It need not be certain that at the time the act is done the damages will ensue. *Id.*, 220

26. In an action brought to recover under the provisions of Chap. 114, R. S., prohibiting unjust discrimination in freight rates by carriers by rail, this court holds that the trial court properly held that defendant was guilty of unjust discrimination, as charged in the first count of the declaration, but that the amount of damages allowed was greater than the evidence warranted; and that it was not guilty under the second count, the rate therein referred to relating to another quality of coal, shipped in a different manner, it not appearing that plaintiff shipped any such coal, although another company did, at a rate which was less than that charged the plaintiff on a different quality of coal. *L. E. & St. L. C. R. R. Co. v. Crown Coal Co.*, 228

27. It is for the jury in an action against a railroad company to decide whether the statutory signals were given upon a certain occasion. *C. C. C. & St. L. Ry. Co. v. Richey*, 247

28. The mere failure to ring a bell or sound a whistle, does not create a liability. It must be shown, in addition, that the injury was occasioned by such negligence, and that the person, when injured, was in the exercise of ordinary care. *Id.*, 247

29. In an action brought to recover damages from a railroad company for personal injuries alleged to have been suffered through its negligence, this court holds, in view of the refusal of certain instructions touching care of the plaintiff and negligence of the defendant, asked by the defendant, that the judgment against it can not stand, the same being material for the proper presentation of the law of its side of the case. *Id.*, 247

RAILROADS. *Continued.*

30. A railroad company is not bound to fence its track at a point used by the public in the transaction of its business therewith. *C. C. C. & St. L. Ry. Co. v. Myers*, 251

31. In the absence of evidence of common law negligence, a person can not recover for injury to stock at a point which the company was not bound to fence. *Id.*, 251

32. The burden of proof is on the plaintiff to show that the place in question was required to be fenced. *Id.*, 251

33. A railroad company must, in the use of its franchise, so exercise its rights as not to negligently injure others, and is responsible for the negligent acts of its servants, and for the habitual carelessness which it knows of and permits to be practiced by others on its trains, and is also liable for the negligence of any other company or person whom it permits to use its road, and this rule applies to postal clerks. *O. & M. Ry. Co. v. Simms*, 260

34. A railroad company permitting its train boys to sell papers upon its depot platforms to citizens of towns through which its road passes, is responsible for injuries to such persons occasioned by the wilful negligence of its servants in running its trains at a high and unlawful rate of speed, and the throwing of mail sacks from such swiftly moving trains upon the same. *Id.*, 260

35. In the case presented, this court holds as proper, evidence going to show that people usually came upon the platform when trains arrived, without objection by defendant; that it was likewise proper to introduce evidence touching the practice of throwing mail sacks from moving trains upon the platform, but that it was not proper to permit the plaintiff to show by a witness that the latter was struck by a mail sack near the platform, two years before. *Id.*, 260

36. Upon the question of damages in such case, it is improper to admit evidence touching the expense of supporting the family of the person killed per year at the time of the death. The damage recoverable is just compensation for the loss of means of support which deceased might have provided had he lived. *Id.*, 260

37. The mere fact that the owner of stock allowed the same to run at large, contrary to law, and it is injured by a railroad train upon an unfenced right of way, the law requiring the same to be fenced, will not bar a recovery, where the company's servants failed to use reasonable care and precaution, under all the circumstances of the case, to avoid the injury. *L. C. & St. L. C. R. Co. v. Dulaney*, 297

38. In the case presented, this court holds that the evidence justified the jury in finding defendant's engineer guilty of such gross and wilful negligence as warranted a verdict for the plaintiff, notwithstanding the fact that he allowed his animal to run at large. *Id.*, 297

39. This court holds as erroneous, the failure to exclude a remark made by the plaintiff while testifying, its substance being that domestic animals were allowed to run at large in his township, there being no

RAILROADS. *Continued.*

stock law, for the reason that it was not the best evidence to prove the fact. *Id.*, 297

40. In an action against a railway company to recover damages for the death of a person alleged to have been caused by defendant's negligence, where there is absolutely no evidence to show that deceased was in the exercise of due care at and just before the accident which caused his death, a peremptory instruction for the jury to find for the defendant is proper. *Lauster v. C. M. & St. P. Ry. Co.*, 534

41. In an action against a railroad company to recover damages for the death of plaintiff's intestate, this court holds that there was sufficient evidence to support the verdict for the plaintiff, and that the court could not, as matter of law, say that deceased was guilty of contributory negligence. *C. & E. I. R. R. Co. v. Shannon*, 540

REAL PROPERTY—See ACTIONS, 1; AGENCY, 2, 6, 7, 8; CONTRACTS, 14, 15; CREDITORS' BILLS, 1, 2, 3, 4, 5; FIXTURES, 1, 2, 3; JUDGMENTS AND DECREES, 10; SPECIFIC PERFORMANCE, 1, 2; STREETS AND ALLEYS; WRITS OF ASSISTANCE.

1. By ownership of property, as applied to real estate, is meant title thereto, and title can not be shown by parol; neither is the mere production of a deed to a grantee, standing alone and in and of itself, evidence of title to show that the grantee is the owner of the property therein described. *Joyce v. E. St. L. E. S. Ry. Co.*, 157

2. It is too late for a person in possession of lands under a contract to convey, to object to a deed tendered after examining the same, and stating that it was satisfactory. *Griswold v. Brock*, 203

3. Upon a bill filed, asking that the purchase price of certain lands in possession of the defendants be paid with interest, or that an account be taken of rents and profits derived from said lands, and the original purchase money with the rents and profits should be paid, a certain contract of sale thereof having been entered into, the defendants having paid a nominal sum and entered thereon, this court holds that complainants were not barred through *laches* from maintaining their bill, and declines, in view of the evidence, to interfere with the decree in their behalf. *Id.*, 203

4. Where a vendor files a bill to cancel a contract to purchase certain real estate, by the terms of which contract, payment was to be made after an abstract of title had been furnished and found satisfactory, it is not sufficient to allege that vendee did not find the abstract furnished satisfactory, and that he, the vendor, has tendered a warranty deed and the earnest money, which has been declined. *Sloane v. Wells*, 398

5. It does not, in the case presented, from such allegation appear that the vendee ought to have been satisfied with the abstract, or that, in tendering a warranty deed, there was tendered a good and sufficient title. *Id.*, 398

6. In the case presented, a contract for the sale of real estate was executed by an agent, acting under parol authority; the vendor subsequently refused to complete the transaction, whereupon the contract was recorded; this court holds that, under the circumstances of the case,

REAL PROPERTY. *Continued.*

a bill to remove the cloud from the vendor's title was properly sustained. *Sargent v. McGuire*, 582

REMEDIES—See ACTIONS, 5.

REMITTITUR—See APPEAL AND ERROR, 1, 19; VERDICTS.

REPLEVIN.

1. In an action of replevin brought to recover a quantity of liquors seized by the sheriff under a writ of attachment sued out by the creditors of a party named, this court holds, in view of the evidence, that plaintiff's remedy is by suit upon the contract for the purchase money, and that the judgment for the defendant can not be interfered with. *Richelieu Wine Co. v. Ragland*, 257

2. Where a sheriff, being the defendant in an action of replevin, justifies under an execution, and desires to show that the claim of the plaintiff (who is not the defendant in the execution) is fraudulent as to creditors, he must show a valid judgment as well as an execution thereon issued. *Calumet Paper Co. v. Knight & Leonard Co.*, 566

SALES—See CONTRACTS, 8; HUSBAND AND WIFE, 7; SPECIFIC PERFORMANCE; WARRANTY.

1. When articles sold are cumbrous or ponderous, so that a removal is not practicable, it is not necessary that there should be an actual change of possession from hand to hand, but it is sufficient if the buyer assumes the control of the property in an open and notorious manner, and the seller is divested of every species of possession from which an inference of ownership might arise. *Hewett v. Griswold*, 43

2. Whether in such case all has been done that ought to have been done to constitute a delivery, is largely a question of fact to be determined by the jury under proper instructions. *Id.*, 43

3. In an action brought to recover for certain brick sold, there being a contention as to the price thereof, this court declines, in view of the evidence, to interfere with the judgment for the defendant. *Abt v. Weyand*, 235

4. In an action brought to recover money paid as one-third payment in the purchase of a mining refusal, this court holds that the case was fairly left to the jury upon the question whether the money was paid under an agreement that it should be returned if other parties did not pay the balance, and that the judgment for the plaintiff can not be interfered with. *Beveridge v. Parmelee*, 359

5. Such being the agreement in a given case, defendants in a suit based thereon are personally responsible, especially where they acted for another who was a non-resident. *Id.*, 559

6. In a controversy touching the sale of certain school bonds which were forged, this court holds, in view of the evidence, that the plaintiffs are entitled to a judgment in a sum named. *Cole v. National School Furnishing Co.*, 473

7. A contract for the sale of realty, providing that in case of default the defaulting party should pay to the broker of the other party the sum of \$500 as liquidated damages, this court holds, first, that before a broker

SALES. *Continued.*

could maintain his action for the sum specified, he must prove in addition to the default of the defendant that his principal had performed all that the contract required on his part, or that he was ready to perform, and second, that the action should have been brought in the name of the principal, the brokers not having been parties to the contract, which was under seal, although it contained a provision in their interest. *Gridley v. Bayless*, 503

SCHOOLS—See INJUNCTIONS, 5, 6; SALES, 6.

1. A board of school directors can exercise no other powers than those expressly granted, or such as may be necessary to carry into effect a granted power. *School Directors v. Wright*, 270

2. In view of Sections 42 and 48, Chap. 122, R. S., a school board may not locate the site of a school house, without a selection being made by a majority vote at an election duly held, unless no locality receives such vote. *Id.*, 270

SEPARATE MAINTENANCE—See HUSBAND AND WIFE, 4.

SET-OFF—See INSOLVENCY, 8, 9; MUNICIPAL CORPORATIONS, 6; PRACTICE, 4.

1. At law the right of set-off has been greatly extended of late years in this State. *T. S. M. E. Church v. Wetherell*, 414

SPECIAL INTERROGATORIES.

1. Special interrogatories should be single and not relate to evidentiary facts merely. *Ingalls v. Allen*, 624

2. Where a jury fails to answer special interrogatories, counsel should call attention of the trial court to the fact and move that the jury be sent back to answer them. *Id.*, 624

SPECIFIC PERFORMANCE.

1. Even where a contract for sale of land is mutual, the subject-matter within the control of that court, and there has been a prompt offer to perform, a court of equity will still exercise a sound discretion, in view of all the circumstances, as to whether it shall grant a decree for specific performance. *Short v. Kieffer*, 515

2. Upon the case presented this court holds that the complainant was not entitled to receive at the hands of a court of equity a decree for the specific performance of the contract in evidence, much less, the subject-matter of that contract having been sold at judicial sale with the full knowledge of and without objection on the part of, the vendee, and he having made no claim to specific performance prior to that sale, can be held entitled to relief out of the proceeds of that sale. *Id.*, 515

STATUTES—See MORTGAGES, 6, 7.

1. If two inconsistent acts be passed at different times, the last is to be obeyed and the first must give way. *Commissioners of Highways v. Deboe*, 25

2. A thing which is within the object, spirit and meaning of a statute is as much within the same as if it were within the letter. *Co. of Franklin v. Layman*, 163

STATUTES. *Continued.*

3. Where a statute is relied upon for a recovery or as a defense, the pleader need not refer to or negative an exception or proviso, where it is not contained in the enacting clause. *Newborg v. Freehling*, 463

4. In the case presented, this court holds that defendant's demurrer to plaintiff's second replication should have been overruled; that if defendant desired to avail himself of the benefit of the exception in the statute in question he should have set it up by way of rejoinder, and that the judgment for the defendant can not stand. *Id.*, 463

STATUTE OF FRAUDS.

1. If the promise is in the nature of an original undertaking to pay the debt of a third party, and is founded on a valuable consideration received by the promisor, it is not within the statute of frauds. *Scudder v. Carter*, 252

2. The statute of frauds requires that the promise to pay the debts of another shall be in writing, and the common law requires such promise to be based upon a sufficient consideration, else the promise is not binding. *Bacharach v. McCurrach*, 584

STREETS AND ALLEYS.

1. One of the legal consequences, where two or more parties hold land under the same subdivision, is that neither party can obstruct the other in the use of any alley in the subdivision, if, to that other, such use, in connection with his lots, be highly convenient and beneficial. *Newell v. Sass*, 580

STREET RAILWAYS—See APPEAL AND ERROR. 20.

1. In an action brought to recover from a street railway company for injury to a boy while "stealing a ride," the same being alleged to have occurred through being kicked off a moving car by the conductor thereof, this court holds, in view of the evidence, that the judgment for the plaintiff can not stand. *C. W. D. Ry. Co. v. Conley*, 347

2. A newsboy was injured while clinging upon the front platform of a street car, as the result of the cars running off the track; this court holds, in an action brought against the street car company to recover damages for the injuries so received, that as the evidence failed to show that the street car company or its employes were guilty of gross negligence, the boy, who was not a passenger but a mere licensee, could not recover. *North Chicago Street Railway Co. v. Thurston*, 587

3. The stopping of a street car is an invitation to would-be passengers to get on board, and it is the duty of the company to afford to such a reasonable opportunity to do so. The company is bound to exercise the highest diligence to enable parties invited to board its cars to get upon, to ride in, and to leave its cars safely. *No. Chicago St. Ry. Co. v. Cook*, 634

4. Where a person boarding a car is injured by the premature starting of the car, it is no excuse for the company that the car was signaled to start by another passenger and not by its servants. *Id.*, 634

TENDER—See CONTRACTS, 19.

TRESPASS—See FORMER ADJUDICATION, 1.

1. It is not necessary in trespass to describe in the declaration the close on which the trespass was committed. *Meixsell v. Feezor*, 180
2. In such case the questions of possession and the commission of a trespass are for the jury to decide from the evidence adduced. *Id.*, 180
3. One directing a person to cut timber in certain places is responsible for a trespass of such person upon the lands of others, they having been included in the directions given. *Id.*, 180
4. An owner may take from a wrongful holder his own, if he can do so without a breach of the peace. *Harding v. Sandy*, 442
5. The execution of a lease by a person acting as agent for another, authorizing the continuation of a trespass, makes the party executing such lease liable to the party entitled to the possession at the time of the commission of the trespass. *Snow v. McCormick*, 537
6. Where plaintiff in an action of trespass *quare clausum*, has never regained possession of the land in controversy, he can recover damages only for the entry or entries. *Greenlee v. Goldstein*, 639

TRIAL BY JURY.

1. A court of chancery may submit an issue against a defendant to a trial by jury, and though ordinarily discretionary, such court may in a given case be bound to do so, where the law entitles the party to such trial. *Woolverton v. Taylor Co.*, 424

TROVER.

1. The fact being that the defendant in an action of trover was an innocent purchaser of the property involved, in good faith and for value, from one who had the physical possession of it with every *indicia* of actual ownership, proof of a demand and refusal is necessary, there being no proof of an actual conversion in order to maintain the action. *Metcalf v. Dickman*, 284

TRUST FUNDS—See ADMINISTRATION, 7; AGENCY, 3, 4, 5.

1. In order to pursue a trust fund, its identity as a fund must be preserved, so that it can be distinguished from all other funds, or if intermingled, that the intermingling was done without the consent of the *cestui que trust*. *Chapin & Gould v. Wabash Mfg. Co.*, 446

USURY—See NEGOTIABLE INSTRUMENTS, 8.

VARIANCE.

1. Proof of more than is alleged in a declaration constitutes no variance. *Murdock v. Walker*, 590

VERDICTS.

1. An excessive verdict may be cured by a *remittitur*. *I. C. B. R. Co. v. Blye*, 612

WARRANTY—See CONTRACTS, 4.

1. No implication arises that a warranty exists as to an article sold as second-hand goods that it will answer the purpose for which made. *Ramming v. Caldwell*, 175
2. In an action brought to recover from alleged breach of warranty

WARRANTY *Continued.*

of certain harvesters, this court holds, in view of the evidence, that the judgment for the plaintiff can not stand. *Kingman & Co. v. Decker*, 303

WATERCOURSES—See RAILROADS, 10, 11, 12, 15, 16, 17, 20; WITNESSES, 2.

1. The right of an owner of land bounding an inland stream to confine the waters thereof to the original channel, must be exercised with reference to permitting the flow to continue, and not an absolute obstruction thereof. *O. & M. Ry. Co. v. Nuetzel*, 108

2. The rule of law in this State touching regular watercourses and surface water is the same. *Id.*, 108

3. Where there is evidence of injury by water coming from different sources by different causes and all creating damage, the jury in a given case must be left at liberty to estimate, as best they may, from the evidence, how much of the whole damage was occasioned by the water coming from a particular source from a particular cause. The same rule must be applied when the court tries the case without a jury. *O. & M. Ry. Co. v. Combs*, 119

WITNESSES—See ADMINISTRATION, 2, 3, 5; DIVORCE, 5; EVIDENCE, 1, 2.

1. A jury has not the right from mere whim or caprice to reject the testimony of an uncontradicted and unimpeached witness. *O. & M. Ry. Co. v. Atterbury*, 80

2. The issue in a given case being as to whether a railroad embankment caused an obstruction to the flow of water in consequence of which certain lands of the party bringing the action were flooded, one of his witnesses should not be asked upon cross-examination as to his opinion whether such lands would have been flooded if there had been no deposit of *debris* brought down by a certain stream, such question being irrelevant and improper cross-examination. *O. & M. Ry. Co. v. Nuetzel*, 108

3. Leading questions are proper where a witness is hostile. *Meixsell v. Feezor*, 180

4. The antecedents of a witness are a proper subject-matter of inquiry upon cross-examination, and a ruling allowing such cross-examination, but disallowing undue prolixity, is proper. *T., St. L. & K. C. Ry. Co. v. Bailey*, 292

5. The credibility of a witness should not be impeached for the reason that a litigant pays him a moderate sum in excess of his legal fees for attending a given trial. *C. W. D. Ry. Co. v. Conley*, 347

6. This court holds as proper the refusal of the trial court to permit defendant's witnesses to answer certain questions, such questions simply calling for their opinions. *Burt v. Wrigley*, 367

7. Where a witness had testified that he signed a certain instrument without reading it, it is proper, upon cross-examination, to inquire as to his previous business, for the purpose of showing that he was a man of experience and affairs. *Poppers v. Peterson*, 571

8. Upon the question whether the non-attendance of a witness was

WITNESSES. *Continued.*

caused by the neglect of the appellant, this court holds that the evidence sustained the decision of the court below, that such negligence was the cause of the non-attendance. *Sinsheimer v. Skinner Mfg. Co.*, 608

9. Every one is presumed to know the value of articles in common use, and it is not necessary to call a dealer to prove the value of such things. *Parmelee v. Raymond*, 609

10. A witness should not be permitted to frame an answer to a question in such a way as to cover the very question to be found by the jury where such finding is a conclusion based upon facts. *I. C. R. R. Co. v. Blye*, 612

WRITS OF ASSISTANCE.

1. In the case presented, this court declines, in view of the evidence, to interfere with an order directing that a writ of assistance be issued, parties in possession of premises upon which a mortgage had been foreclosed, the same having been sold, refusing to give possession thereof. *Carpenter v. White*, 448

S. J. W. C.

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